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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 426

WILLIAM HEIKKILA, APPELLANT,

vs.

BRUCE G. BARBER, INDIVIDUALLY AND AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE FOR THE THIRTEENTH IMMIGRATION DISTRICT, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED OCTOBER 29, 1952

Probable jurisdiction noted December 8, 1952.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 23, 1952.

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in the hearings above mentioned. (Tr. 61.) That the theory upon which the said evidence was admitted was:

> ". . . because it is an admission of something to which he declined to testify at this time. In ruling in that manner, an admission against a man's interest would be available to this record if he refused to testify on the point at this time." (Tr. 55.)

[fol. 15] This is the ruling of the Hearing Examiner.

That the hearing was then adjourned to a date to be set by the Hearing Examiner subsequently, in order to allow the Immigration and Naturalization Service to take the testimony in New York of a witness who would testify to the nature, aims, and objectives of the Communist Party of the United States. (Tr. 77.)

VI

That thereafter, on November 28, 1950, the hearing was reconvened in San Francisco. During the course of that hearing, the examining officer lodged, over objection of petitioner, a new charge that "He is subject to deportation under the Act of October 16, 1918, as amended, in that he is found to have been after entry a member of the following class set forth in Section 1 of said Act, to wit: an alien who was a member of the Communist Party of the United States . . ." (Tr. 84.) That the Hearing Officer at the same time stated:

> "In connection with the lodging of this charge I move that the charge in the warrant of arrest, identified as Exhibit 1, be not considered in arriving at a final decision in this case."

That the Hearing Officer stated (Tr. 85):

> ". . . consideration in this case will be confined to the lodged charge."

That thereupon, on motion of counsel for petitioner, the deposition of a witness with respect to the nature of the Communist Party which had been admitted in evidence was stricken, together with the exhibits attached to it. (Tr. 86.) That there was no other evidence bearing on the nature of

the Communist Party. That an offer of proof by petitioner with regard to the nature of the Workers Party and the Communist Party during the years 1929 to 1939 was rejected by the Hearing Officer at a subsequent hearing on January 2, 1951.

VII

That at the said hearing on January 2, 1951, the Hearing Officer, Milton T. Simmons, presided as "Hearing Officer" under the rules and regulations of the Immigration and Naturalization Service, without observance of the require-[fol. 16] ments of the Administrative Procedure Act, supra. That he was the same person who had presided at the hearing in June 1950 as a "Hearing Examiner," purporting to act in conformance with the provisions of the Administrative Procedure Act.

(Sgd.) George R. Andersen.

Subscribed and sworn to before me this 12th day of July, 1952. (Sgd.) Agnes Quave, Notary Public in and for the City and County of San Francisco, State of California. (Notarial Seal.)

[File endorsement omitted.]

[fol. 17] In the United States District Court for the Northern District of California, Southern Division

No. 31,671

William Heikkila, Plaintiff,

vs.

Bruce G. Barber, Individually and as District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District; John Doe One through John Doe Ten, inclusive, Defendants

Judgment—Filed August 4, 1952

William Heikkila, plaintiff herein, having applied to a judge of this court for an interlocutory injunction restraining the enforcement, operation and execution of an Act of

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31671

WILLIAM HEIKKILA, Plaintiff,

vs.

BRUCE G. BARBER, Individually and as District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District; JOHN DOE ONE through JOHN DOE TEN, inclusive, Defendants.

COMPLAINT FOR INJUNCTION, DECLARATORY RELIEF AND A REVIEW OF ADMINISTRATIVE ACTION—Filed July 11, 1952

To the Honorable the Judges of the Above-entitled Court:

The complaint of William Heikkila respectfully represents and alleges:

I

That the within cause involves the constitutionality of statutes of the United States and requires adjudication thereon by a three-judge court.

II

That plaintiff is and at all times herein material has been a resident of the City and County of San Francisco, State of California, and within the jurisdiction of this Court.

That the defendant Bruce G. Barber is and at all times herein material has been a resident of the City and County of San Francisco, State of California, and within the jurisdiction of this Court, and District Director of Immigration for the Thirteenth Immigration District.

That the true names of the defendants sued herein as John Doe One through John Doe Ten, inclusive, are presently unknown to plaintiff, but plaintiff alleges that said [fol. 2] persons are acting in concert with, or under the direction, supervision and control of the defendant Bruce

G. Barber, and plaintiff prays leave to insert herein the true names of said defendants when the same have been ascertained.

III

That the amount in controversy exceeds the sum of $3,000.

IV

That jurisdiction of this Court is conferred by the provisions of 28 USCA §1331, 1346(a) (2) and 5 USCA §1009.

V

Plaintiff William Heikkila was born in Veteli, Waasa, Finland, on March 14, 1906, and came to the United States at the age 2½ months, with his father and mother, arriving at New York City on June 10, 1906. He has since that date resided in the United States. He regards himself as a national or citizen of the United States and as owing allegiance to the United States and to no other state or nation. He has no knowledge of his citizenship, but is informed that he may be a citizen of the United States by birth, deriving his citizenship through his mother, who in turn derived her citizenship by derivation from her father. Plaintiff is investigating the facts which would support that possibility. Plaintiff is a draftsman by occupation, and is and for many years past has been employed as such in the City and County of San Francisco.

Plaintiff has except for approximately two months immediately after his birth, never resided in Finland. He has never paid any taxes to Finland, nor voted there, nor done any other act which would attach him to Finland as a citizen or national thereof.

VI

That on or about December 30, 1947, the defendant Barber, or his predecessor, executed or caused to be executed a warrant for the arrest of petitioner, charging him with violation of the immigration laws of the United States, in that he was alleged to then be a member of an organization which believed in, advised, advocated, or taught the overthrow of the Government by force, violence, or other

unconstitutional means, in violation of the provisions of [fol. 3] 8 USCA §137. Hearings were held in 1949 before a Hearing Officer of the Immigration and Naturalization Service under the charge contained in the warrant. These hearings did not conform to the requirements of the Administrative Procedure Act, 5 USCA 1001, et seq. The said hearings were and are illegal, unconstitutional and void.

VII

Subsequently, by reason of the decision of the Supreme Court of the United States in the case of *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, those hearings were abandoned by the said Immigration Service and new hearings were instituted before a Hearing Examiner who purported to be appointed under and to be conducting the hearings in accordance with the provisions of the Administrative Procedure Act. These second hearings were held in June 1950. The charge before the Hearing Examiner was the charge contained in the warrant issued December 30, 1947.

VIII

During the course of the said hearing, the Hearing Examiner admitted into evidence, over objection of plaintiff, a portion of the transcript of record of the 1949 hearing. Said portion of the transcript was introduced for the purpose of establishing that plaintiff had admitted being a member of the Workers Party and of the Communist Party from 1929 to 1939, and not thereafter. The admission of the said transcript was against law and deprived plaintiff of due process of law and of the guarantee against self-incrimination contained in the Fifth Amendment to the Constitution of the United States.

IX

The said hearings in 1950 deprived plaintiff of due process of law and were against law, in that they failed to conform to the requirements of due process of law for the reason, among others, that the Hearing Examiner had been an employee and officer of the Immigration and Naturalization Service for many years prior to his appointment as

Hearing Examiner, and in such prior service had conducted [fol. 4] investigations, prosecutions and hearings of aliens. That the said Hearing Examiner was not an impartial hearing officer as required by the provisions of the Administrative Procedure Act, 5 USCA 1001, et seq. That by reason of the partiality of the said Hearing Examiner the said hearings in 1950 did not comply with the requirements of the Administrative Procedure Act, 5 USCA 1001, et seq.

X

Subsequent to the hearings held in June 1950, the said Hearing Examiner continued as the tribunal in which the said charges were heard and determined, but after September 27, 1950, by reason of the passage of the Supplemental Appropriations Act (Public Law 843, 81st Congress, 64 Stat. 1048, 8 USCA 155a) the said Hearing Officer functioned without compliance with the Administrative Procedure Act and under the theory that said Administrative Procedure Act no longer applied.

XI

That during the course of the said hearings in November, 1950 the Immigration and Naturalization Service, by its Examining Officer appeared at the said hearing, lodged a new charge against plaintiff, charging he had been since entry a member of the Communist Party. Said lodged charge was drawn under the provisions of 8 USCA § 137 (2) (C) providing for the exclusion from the United States of aliens who are members of or affiliated with the Communist Party of the United States, and §137-3 providing that any alien who was at the time of entering the United States, or has been at any time thereafter a member of one of the classes of aliens enumerated in §137(2) shall upon the warrant of the Attorney General be taken into custody and deported.

XII

That said Examining Officer stated, and the Hearing Officer agreed, that decision in the said administrative hearing should be upon the lodged charge only, and not upon the charge contained in a warrant, and should be based upon the portion of the transcript of record from

[fol. 5] the 1949 hearing which had earlier been introduced in evidence in the June 1950 hearing.

XIII

That thereupon the Hearing Officer recommended a decision that plaintiff be deported on the grounds that the said lodged charge had been established. By subsequent appeal to the Commissioner of Immigration and to the Board of Immigration Appeals, the recommended order of the Hearing Examiner was sustained and on January 11, 1952, a final order for the deportation of plaintiff on the grounds stated above as set forth in the lodged charge was made and entered.

XIV

That the Workers Party and the Communist Party of the United States during the period 1929 to 1939 were not organizations which believed in, advocated, or advised the overthrow of the Government of the United States by force, violence, or other unconstitutional means, nor a Communist action organization, nor a Communist front organization, nor a Communist organization, as those terms are used in 50 USCA 781, 782, et seq.

XV

That plaintiff did not during the period 1929 to 1939, and he has not at any time prior or subsequent to the said period, believed in, advocated, or advised the overthrow of the Government of the United States by force or violence, or other unconstitutional means, and that plaintiff has at all times been loyal to the Government and the Constitution of the United States. That plaintiff now has pending before the Superior Court of the State of California, in and for the City and County of San Francisco, a petition for naturalization.

XVI

That plaintiff offered to prove during the said 1950 hearings that the Workers Party and the Communist Party of the United States during the period 1929 to 1939 were not organizations which believed in, advocated, or advised the

overthrow of the Government of the United States by force or violence, or other unconstitutional means, and plaintiff had not at any time and did not at that time so believe, [fol. 6] advocate or advise. The said offer of proof was rejected by the said Hearing Examiner. By rejecting the said offer of proof the Hearing Examiner deprived plaintiff of due process of law.

XVII

That defendants threaten to, and unless restrained by the order of this Court will, on or after Friday, July 11, 1952, take into custody and deport from the United States plaintiff. That plaintiff has been, and by such action will further be deprived of constitutional rights in the following respects:

1) The deportation has been ordered and will be carried out under color of 8 USCA 137(2) and 137-3, which statutes are unconstitutional and void, in that they constitute a bill of attainder in violation of the provisions of Article I, Section 9, Clause 3 of the Constitution of the United States, and an ex post facto law in violation of the same provision of said Constitution.

2) Said deportation has been ordered and will be carried out under color of the said statutes which are unconstitutional and void, in that they deprive plaintiff of the guarantee of free speech and free press contained in the First Amendment to the Constitution of the United States and the guarantee of due process of law contained in the Fifth Amendment to the Constitution of the United States.

XVIII

That plaintiff is without any speedy or adequate remedy at law.

XIX

That there exists between plaintiff and the defendants controversy in that plaintiff maintains that the acts and threatened acts of defendants here complained of are illegal and void for the reasons hereinabove set forth, while the defendants maintain on the other hand that the said acts are lawful in all respects.

Wherefore, plaintiff prays:

1) For temporary and permanent injunctions restrain-
[fol. 7] ing defendants, and each of them, their successors, if any, and all persons acting in concert with them or their successors, or under the direction or control of the defendants or their successors, from in any manner seeking to deport plaintiff, or deporting plaintiff, restraining, arresting or imprisoning plaintiff by color of the order of January 11, 1952, or any other order issued under color of authority of 8 USCA 137(2) and 137-3.

2) A declaration of rights of the parties in the matters hereinabove set forth.

3) A review of agency action with respect to the matters hereinabove set forth.

Gladstein, Andersen & Leonard, By (S.) Floyd E. McMurray, Attorneys for Plaintiff.

[fol. 8] *Duly sworn to by William Heikkila. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

ORDER DESIGNATING UNITED STATES CIRCUIT JUDGE AND UNITED STATES DISTRICT JUDGES PURSUANT TO SECTION 2284 OF 28 UNITED STATES CODE—July 15, 1952

Whereas, in my judgment the public interest so requires, I, pursuant to the provisions of Section 2284, Title 28, United States Code, do hereby designate and appoint the Honorable Clifton Mathews, United States Circuit Judge for the Ninth Judicial Circuit, and the Honorable Oliver J. Carter, United States District Judge for the Northern District of California, to sit with the Honorable Louis E. Goodman, United States District Judge for the Northern District of California, and to hold the District Court for the Northern District of California and to hear and deter-

mine the following cause: Heikkila v. Barber, et al, No 31,671, and all motions and proceedings therein.

Dated at San Francisco, California, this 15th day of July, 1952.

(S.) Clifton Mathews, Acting Chief Judge, United States Court of Appeals, Ninth Judicial Circuit

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed July 29, 1952

Comes now the defendant, Bruce G. Barber, by and through his attorneys, Chauncey Tramutolo, United States Attorney for the Northern District of California, and Edgar R. Bonsall, Assistant United States Attorney for said District, appearing specially, and moves the Court for the dismissal of the Complaint on the following grounds:

(1) The Complaint fails to join an indispensable party, in that the action is brought to review the Order of Deportation of the Commissioner of Immigration and Naturalization, Washington, D. C., and not of the defendant, Bruce G. Barber, so that the Commissioner of Immigration and Naturalization is an indispensable party to the adjudication of the controversy.

(2) The action has not been brought in the proper venue in that the official and actual residence of the Commissioner of Immigration and Naturalization is Washington, D. C.

(3) The Court is without jurisdiction over the person of the Commissioner of Immigration and Naturalization, who is an indispensable party to this action.

[fol. 11] (4) The Complaint fails to state a claim upon which relief can be granted in that:

(a) The issues raised by the pleading are moot, as the plaintiff has been accorded a fair hearing, in compliance with all of the present immigration laws and regulations, and any new hearing would be merely repetitious and accomplish no useful purpose.

(b) The Immigration Act of October 16, 1918, as amended by the Internal Security Act of September 23, 1950 (8 USC, 137) is constitutional.

(c) The Court is without jurisdiction of the subject matter of this action and the Complaint fails to state a claim upon which relief can be granted in that the plaintiff has a full, complete and adequate remedy at law.

(S.) Chauncey Tramutolo, United States Attorney.
(S.) Edgar R. Bonsall, Assistant United States Attorney.

[File endorsement omitted.]

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE R. ANDERSEN—Filed August 1, 1952

STATE OF CALIFORNIA,

City and County of San Francisco, ss.:

George R. Andersen, being first duly sworn, deposes and says:

That he is one of the attorneys for petitioner herein and the attorney who represented the petitioner in the various hearings held by the Immigration and Naturalization Service referred to in the petition for injunction in this cause. That he makes this affidavit on behalf of petitioner and in support of the said petition for injunction and other relief.

That the following facts are true to the best of your affiant's recollection, and that they are based in part upon affiant's recollection and in part upon the transcript of testimony taken before the hearing officers of the Immigration and Naturalization Service on the dates noted below:

I

That the initial hearings in the case of petitioner were held on June 13, 1949, and other days before Gilbert F.

Gaynor, Presiding Inspector, in the City and County of Sa Francisco. That at the said hearing and on said day peti tioner testified with respect to his membership in the Com mmnist Party and the Workers Party during the period 192 to 1939. That it is not intended by this affidavit to set fort or imply what that testimony was.

II

That the said hearings before Gilbert F. Gaynor were no [fol. 13] conducted in accordance with the Administrativ Procedure Act, 5 U.S.C.A. 1001, et seq.

III

That the testimony of petitioner in that hearing was give over petitioner's objection. That petitioner objected to th hearings as void and illegal and depriving him of due proc ess of law, and as in violation of the provisions of the Ad ministrative Procedure Act.

IV

That at the hearing held on June 13, 1950, petitioner wa asked:

> "Q. To what political organizations have you or d you now belong?" (Tr. 36.)

Objection was made on the ground that the warrant contain ing the charge then before the Hearing Examiner referre to present membership alone. The objection was sustained The question was then asked:

> "Q. Simply to what organizations have you belonge in the United States?" (Tr. 36.)

That the same objection was made to the question, and th objection was sustained. That the Examining Officer the stated:

> "Mr. Examiner, I propose to show through the direc testimony of the respondent that he has been a membe of the Communist Party of the United States, followin which it is my intention to lodge an appropriate charg relating thereto. Now, I cannot lodge a charge until

have some testimony in that regard and I cannot obtain the testimony if you are going to overrule a direct question to the respondent as to whether he is now or has ever been a member of the Communist Party. I respectfully request that you permit that question to be answered." (Tr. 38.)

[fol. 14] That after some colloquy the Hearing Examiner stated:

"The Examining Officer has explained a valid reason for the question now and it will be permitted to be asked." (Tr. 40.)

That the petitioner was then asked:

"Have you ever at any time since arrival in the United States been a member of the Communist Party of the United States, and are you now such a member?" (Tr. 42.)

This question was amended to:

"Are you now a member of the Communist Party of the United States?"

to which the answer was, "No, sir." (Tr. 42.)

The petitioner was then asked:

"Have you at any time ever been a member of the Communist Party of the United States?" (Tr. 42.)

To this, after a statement of reasons for objecting to it, petitioner replied that on advice of counsel he would not answer the question. He was then asked whether he had been a member of the Communist Party in 1929, 1930, 1931, and each year to and including 1939. To each of these the respondent declined to answer on advice of counsel.

V

That thereafter, on the same day, over objection, the Hearing Examiner admitted in evidence the testimony of petitioner taken on June 13, 1949, before Gilbert F. Gaynor

Congress for repugnance to the Constitution of the United States, and Bruce G. Barber, defendant herein, having moved to dismiss this action, and said application and motion having been heard by this court of three judges under section 2284 of Title 28 of the United States Code, and this court having concluded that said motion should be granted, it is hereby ordered, adjudged and decreed that said motion be, and it is, hereby granted, that this action be, and it is, hereby dismissed, and that said defendant Barber recover his costs.

Dated August 4, 1952.

(S.) Clifton Mathews, United States Circuit Judge, (S.) Louis E. Goodman, United States District Judge, (S.) Oliver J. Carter, United States District Judge.

Entered in Civil Docket Aug. 4, 1952.

Aug. 27, 1952.

[File endorsement omitted.]

[fol. 18] In United States District Court

[Title omitted]

Petition for Appeal—Filed September 3, 1952

Considering himself aggrieved by the final decree and judgment of this Court made and entered on the 4th day of August, 1952, in the within cause, William Heikkila, plaintiff herein, does hereby pray that an appeal be allowed to the Supreme Court of the United States from the said final decree and judgment, and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by the said plaintiff, and that the amount of security be fixed by the order allowing the appeal; and that the material parts of the record, proceedings and papers upon which said final decree and judgment was based, duly authenticated, be sent

to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Respectfully submitted, Gladstein, Andersen & Leonard, by (S.) Lloyd E. McMurray, Counsel for Plaintiff-Appellant.

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—September 3, 1952

William Heikkila having made and filed his petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in this cause entered on August 4, 1952, and from each and every part thereof, and having presented his assignment of errors and prayer for reversal, and his statement as to the jurisdiction of the Supreme Court of the United States on appeal, pursuant to the statutes and rules of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be, and the same is hereby, allowed as prayed for.

It is further ordered that the amount of the appeal bond be, and the same is hereby, fixed in the amount of $250.00, with good and sufficient surety, and that it shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law.

Dated: September 3, 1952.

(Sgd.) Louis E. Goodman, District Court Judge.

[File endorsement omitted.]

[fol. 20] Citation in usual form, omitted in printing.

[fol. 21] IN UNITED STATES DISTRICT COURT,

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed September 3, 1952

William Heikkila, plaintiff in the above-entitled cause, in connection with his appeal to the Supreme Court of the United States hereby files the following assignment of errors upon which he will rely in his prosecution of said appeal from the final judgment of the District Court entered on August 4, 1952.

The District Court erred:

1. In denying a preliminary injunction where the question was presented to it upon the complaint and a motion to dismiss.

2. In denying plaintiff a trial on the merits by ordering the dismissal of his complaint.

3. In denying a declaration of the rights of the parties.

4. In denying a review of the action of the Immigration and Naturalization Service and of the defendant Bruce G. Barber pursuant thereto.

5. In failing to hold the provisions of the statute here attacked, 64 Stat. 1006, 8 USCA § 137(2)(C), and 64 Stat. 1006, 8 USCA § 137-3, were unconstitutional as bills of attainder and ex post facto laws in violation of the provisions of Article I, Section 9, Clause 3 of the Constitution of the United States.

6. In failing to hold that said statutes were unconstitutional and void in that they contravened the provisions of the First Amendment to the Constitution of the United States and the guarantee of due process of law contained in the Fifth Amendment to the Constitution of the United States.

[fols. 22-35] 7. In failing to hold that the final order of deportation deprived plaintiff of due process of law and of the protection of the Administrative Procedure Act, 5 USCA § 1001, et seq., by reason of the conduct of the deportation hearing by a hearing officer who had prior to his appointment as Hearing Examiner under the provisions of the said Administrative Procedure Act conducted investi-

gations, prosecutions, and hearings of aliens and was not an impartial hearing officer.

8. In failing to hold that the order of deportation deprived plaintiff of due process of law and of the guarantee against self-incrimination contained in the Fifth Amendment to the Constitution of the United States by reason of the use, as the sole basis for the said deportation order, of a sworn statement made by plaintiff under compulsion at a prior hearing, which said prior hearing was void, illegal and deprived plaintiff of due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States, and of the protection of the Administrative Procedure Act, 5 USCA § 1001, et seq.

Wherefore, plaintiff William Heikkila prays that the final decree of the District Court be reversed, and for such other relief as the Court may deem fit and proper.

Gladstein, Andersen & Leonard, (Sgd.) by Lloyd E. McMurray, Counsel for Plaintiff-Appellant.

[File endorsement omitted.]

[fols. 36-37] Statement Required by Paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States—(Omitted in Printing.)

[fol. 38] In United States District Court

Praecipe—Filed September 3, 1952.

To the clerk of the above-named court:

You will please prepare transcript of the record in the above-entitled cause to be transmitted to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint.
2. Affidavit of George R. Andersen.
3. Order of July 15, 1952, of Judge Clifton Mathews, convening a three-judge court in the within cause and setting the matter for hearing August 1, 1952.

4. Motion to dismiss.
5. Judgment of August 4, 1952.
6. Petition for appeal.
7. Order allowing appeal.
8. Citation on appeal.
9. Assignment of errors.
10. Statement of jurisdiction of the Supreme Court of the United States.
11. Statement of plaintiff-appellant directing attention to Paragraph 3 of Rule 12 of Revised Rules of the Supreme Court of the United States.
12. Admission of service.
13. Certificate.
14. This praecipe.

Dated: September 2, 1952.

Gladstein, Andersen & Leonard, by (Sgd.) Lloyd E. McMurray, Counsel for Appellant.

[File endorsement omitted.]

[fols. 39-40] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 41] IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1952

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed November 14, 1952

(A) Appellant adopts for his statement of points upon which he intends to rely in his appeal to this Court the points contained in his assignment of errors heretofore filed.

(B) Appellant designates the entire record as filed in the above-entitled case for printing by the Clerk of this Court.

Dated: November 12, 1952.

(Signature illegible), Lloyd E. McMurray, Counsel for Appellant.

[fol. 42] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 426

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—December 8, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

(5520)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 426

WILLIAM HEIKKILA,

Appellant,

vs.

BRUCE G. BARBER, INDIVIDUALLY AND AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE FOR THE THIRTEENTH IMMIGRATION DISTRICT, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATEMENT AS TO JURISDICTION

ALLAN BROTSKY,
Counsel for Appellant,

GLADSTEIN, ANDERSON & LEONARD,
Of Counsel.

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Statutes Cited

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31,671

WILLIAM HEIKKILA,

Plaintiff,

vs.

BRUCE G. BARBER, ETC., ET AL.,

Defendants.

STATEMENT OF JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court, as amended, plaintiff-appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The decision of the District Court for the Northern District of California, Southern Division, is unreported. No opinion was written. A copy of the judgment of the Court is attached hereto as Appendix "A".

Jurisdiction

The judgment of the District Court was entered on August 4, 1952. A petition for appeal is presented to the District Court herewith on September 3, 1952. The jurisdiction of the Supreme Court to review the decision by

direct appeal is conferred by Title 28 United States Code, §§1253 and 2201, and 5 USC §1009. The following decisions, among many others, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Harisiades v. *Shaughnessy*, — U. S. —, 72 S. Ct. 512
McGrath v. *Kristensen*, — U. S. —, 71 S. Ct. 224
United Public Workers v. *Mitchell*, 330 U. S. 75, 67 S. Ct. 556

The judgment appealed from is the judgment of a three-judge district court, convened because the complaint directly attacked the constitutionality of certain sub-sections of the Internal Security Act of 1950, to wit, 64 Stat. 1006, 8 USCA §137(2) (C), and 64 Stat. 1006, 8 USCA §137-3.

Questions Presented

The principal question presented by this case is whether Congress has the power to provide, as it has done in the statutes here attacked, for the deportation of an alien who has been found to have been at any time since his entry into the United States a member of the Communist Party. This statute is attacked as a bill of attainder and an ex post facto law prohibited by the Constitution.

An additional question is whether in the face of undenied allegations that the plaintiff does not and never did advocate the overthrow of the Government of the United States by violence or by any unconstitutional means, that the Communist Party of the United States did not during the period when the plaintiff was alleged to have been a member advocate or advise the overthrow of the Government of the United States by force, violence, or other unconstitutional means, nor was it a Communist organization as those terms are used in 50 USC 781, 782, et seq. (portions of the Internal Security Act of 1950), the District Court may grant the

defendants' motion to dismiss, thus depriving the plaintiff of a trial on the merits.

This case also presents a question of whether a final order for deportation and the threatened execution of that order by a District Director of Immigration may be reviewed by a suit brought in the District Court for an injunction, for declaratory relief, and for a review under the provisions of the Administrative Procedure Act, 5 USCA §1009.

An additional important question is whether the statutes here attacked contravene the guarantee of free speech contained in the First Amendment to the Constitution of the United States, since in this case an undenied allegation of the complaint is that the Communist Party during the period when the plaintiff is alleged to have been a member of it did not advocate the overthrow of the Government by force, violence or other unconstitutional means.

Additional questions noted in the assignment of errors may be urged in briefs and argument before the Supreme Court of the United States.

The Statute Involved

This case attacks certain sub-sections of the Internal Security Act of 1950. The portions directly attacked are 64 Stat. 1006, 8 USCA §137(2) (C), and 64 Stat. 1006, 8 USCA §137-3, which provide as follows:

§137(2) (C):

"any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * * * * * * *

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * * * * * *

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical sub-division of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;"

§137-3:

"(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in paragraphs (1) or (3) of section 137 of this title or * * * a member of any one of the classes of aliens enumerated in section 137(2) of this title, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in sections 137 to 137-8 of this title, irrespective of the time of their entry into the United States."

Also important for consideration are those provisions of the Internal Security Act of 1950 which define Communist organizations and which provide for the determination of what organizations fall within those definitions by a board specially provided for that purpose. These sections are designated by the short title of the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 USC 781, et seq.

Statement of the Case

Plaintiff-appellant was born in Finland in 1906 and came to the United States about the age of 2½ months with his parents. He has ever since his arrival resided in the United States. In 1947 a warrant was issued for his arrest, charging him with violation of the Immigration laws of the United States in that he was alleged to be a member of an organization which believed in, advised, advocated, or taught the overthrow of the Government by force, violence or other unconstitutional means, as proscribed by the provisions of 8 USC § 137. Hearings were held in 1949 before a hearing officer of the Immigration and Naturalization Service under the charge contained in that warrant. These hearings did not conform to the requirements of the Administrative Procedure Act, 5 USCA § 1001, et seq. Subsequently, by reason of the decision of the Supreme Court of the United States in the case of *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 70 S. Ct. 445, those hearings were abandoned by the Immigration Service and new hearings were instituted before a Hearing Examiner who purported to be appointed under and to be conducting the hearings in accordance with the provisions of the Administrative Procedure Act. These hearings were held in 1950, commencing in June and continuing for a number of months. The hearing officer had before his appointment as a Hearing Examiner been an employee and officer of the Immigration and Naturalization Service for many years and had conducted investigations, prosecutions, and hearings of aliens in that capacity. The complaint alleges that the Hearing Examiner was not an impartial hearing officer in accordance with the requirements of the Administrative Procedure Act.

During the course of the hearing the plaintiff was asked whether he was a member of the Communist Party. He

testified that he was not. He then refused to testify abou his membership during the years 1929 to 1939. There wa then introduced in evidence, over plaintiff's objections portions of the transcript of the testimony taken at th 1949 hearing in which plaintiff had under oath testified re garding his membership in the Workers Party and the Communist Party during the years 1929 to 1939. After the admission of this evidence a new charge was lodged against plaintiff, charging him with a violation of 8 USCA §§ 137(2)(C) and 137-3, in that he was alleged to have been since his entry into the United States a member of the Communist Party. All evidence relating to the nature of and the aims or objectives of the Communist Party was stricken from the record, the decision of the hearing officer was confined to the lodged charge and supported only by the testimony given at the 1949 hearing. The plaintiff's offer to prove that he had not advocated the overthrow of the Government, and that neither the Workers Party nor the Communist Party had during the period when he was alleged to have belonged advocated such overthrow of the Government, was denied.

An order of deportation was recommended by the hearing officer, and this recommendation was sustained through the usual administrative appeals, so that there was on January 11, 1952, a final order entered for the deportation of plaintiff, solely upon the ground that he had been found to have been a member of the Communist Party since his entry into the United States.

Plaintiff sought to prevent his deportation by an action against the District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District, the defendant Bruce G. Barber, and all persons acting under his direction, or in concert with him, and the successors of the defendant or any other defendants. In addi-

tion to temporary and permanent injunctions, plaintiff sought by this complaint a declaration of rights, alleging that there existed a controversy between plaintiff and the defendants in that the plaintiff maintained that the acts and threatened acts of the defendants were illegal and void, while the defendants maintained that their actions and threatened actions were lawful in all respects.

Plaintiff also sought a review of the action of the defendant Bruce G. Barber under provisions of the Administrative Procedure Act, 5 USCA § 1009.

The complaint set forth the above facts and alleged also that plaintiff has pending before a state court a petition for naturalization.

The complaint alleged that the statute under which his deportation had been ordered was unconstitutional and void as a bill of attainder and an ex post facto law prohibited by the provisions of Article I, Section 9, Clause 3 of the Constitution of the United States, and a deprivation of the guarantees of free speech and free press contained in the First Amendment to the Constitution of the United States, and of the guarantees of due process of law contained in the Fifth Amendment to the Constitution of the United States. It was also alleged that the use of the testimony from the 1949 hearing, as the sole evidence to support the deportation order, was a violation of the guarantee against self-incrimination contained in the Fifth Amendment to the Constitution of the United States.

The complaint alleged that a three-judge court would be required for adjudication of this cause.

Upon the filing of the complaint a three-judge court was convened by Judge Clifton Mathews of the Court of Appeals for the Ninth Circuit, and a hearing was set for August 1, 1952. Thereupon the defendant filed a motion to dismiss the complaint upon the ground that the complaint

failed to join an indispensable party, to wit, the Commissioner of Immigration and Naturalization. The motion was also based upon the ground that the complaint fails to state a claim upon which relief can be granted, in that the issues raised by the complaint are moot since the plaintiff had been accorded a fair hearing; that the statutes attacked are constitutional; and that the plaintiff had an adequate remedy at law.

Upon these pleadings, and the affidavit of George R. Andersen in support of the complaint (which set forth with some particularity the facts surrounding the introduction of the testimony from the 1949 hearing), the cause was argued before a three-judge court consisting of Judges Clifton Mathews, Louis E. Goodman, and Oliver J. Carter. The court entered its judgment on August 4, 1952, denying a temporary injunction, granting the defendants' motion to dismiss, and ordering the dismissal of the complaint. No opinion was written.

The Questions Are Substantial

The primary question presented by this case is whether Congress has sought to enact a bill of attainder when it provided that an alien who has been found to be at any time since entry a member of the Communist Party, without any other evidence whatsoever, may be deported from the United States. The familiar and definite definition of a bill of attainder appears in *United States* v. *Lovett*, 328 U. S. 309, 513, 90 L. Ed. 1252, 1259:

> ". . . legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."

The court there condemned as a bill of attainder a statute which prohibited the payment of money for wages to cer-

tain named individuals who had been employed by the Government, the effect of which was to permanently bar those individuals from government service. The court relied upon the foundation cases on the subject: *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356, and *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366. In those cases the court held unconstitutional as bills of attainder statutes which required persons to take an oath of loyalty as a prerequisite to following the profession of priest and lawyer.

The statutes attacked here are of precisely the same nature as the statutes held invalid in those cases. Members of the Communist Party, present or former, regardless of their personal beliefs, activities, present status as to membership, and regardless of the nature of the Communist Party, its purposes, activities, and principles, may upon proof of membership to the satisfaction of an administrative tribunal, without more, be banished from this country.

The question is not whether Congress has the plenary power to require the deportation of all aliens; in fact, it is not a question of the power of Congress over aliens at all. It is a question whether the Constitution excludes from the power delegated to Congress, the power to impose penalties without judicial trial, by legislative acts for any purpose. The question is not whether Congress has the power in a proper case to require the deportation of aliens deemed by it to be hurtful to the country; it is a question whether such deportation may be accomplished by a legislative act which is a bill of attainder.

The latest decision by the Supreme Court on bills of attainder is in *American Communications Assn. v. Douds*, 339 U. S. 382, 70 S. Ct. 674. The court there rejected the argument that the provisions of the Labor-Management Relations Act of 1947 constitute a bill of attainder insofar

as they required the filing by trade union officials of affidavits stating that they were not members of the Communist Party. The court distinguished the *Lovett, Garland* and *Cummings* cases, and its distinction is illuminating in this case. The court said with regard to those cases:

> ". . . . But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. . . . . .
>
> "This distinction is emphasized by the fact that members of those groups identified in § 9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in § 9(h), is not a bar to resumption of the position. In the cases relied upon by the unions on the other hand, this Court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. See United States v. Lovett, supra, 328 U. S. at page 314, 66 St. Ct. at page 1078, 90 L. Ed. 1252; Cummings v. Missouri, supra, 4 Wall. at page 327, 18 L. Ed. 356. Here the intention is to forestall future dangerous acts; there is no one who may not by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder" 70 St. Ct. at 691-692.

The distinction set forth by the Supreme Court there has no application to this case, and it points to one of the principal evils of the statute under attack. Under this statute punishment is visited upon past conduct; past conduct is a bar to further residence in the United States;

nothing the alien can do can ever change the result; there is no possibility that he may by voluntary alteration of the loyalties which impel him to action become eligible to remain in the United States.

A related question is whether the statutes under attack here are invalid as *ex post facto* laws. Granted that the prohibition against *ex post facto* laws has in the most recent decision of the court on the subject been held inapplicable to deportation; see *Harisiades* v. *Shaughnessy*, — U. S. —, 72 St. Ct. 512, the policy of the founders of our nation in prohibiting *ex post facto* laws would appear to have been directly aimed at such legislation as the statutes under consideration here. It is difficult to imagine what could be more akin to a criminal penalty than the banishment of an alien like the plaintiff, who has since he was two and one-half months old known no other country than the United States.

The statute, if it is rational, proceeds upon the clearly untenable theory that one who has at any time, even for a single day or perhaps for a single hour, been a member of a proscribed organization, bears within him from that moment forward through all his years a germ of unlawful revolt so dangerous to the security of the United States that he must be banished from the United States without any consideration of his subsequent conduct, belief, activities, contributions to the common welfare, adherence to the Constitution of the United States, and without the safeguard of a judicial trial. No theory of psychology, nor any facts known to Congress could possibly support this preposterous theory of perseveration. Adherence to political ideas or political groups is not an ineradicable, attaining, self-perpetuating act.

A second substantial question presented by this case is whether a district court may dismiss, without a trial on-

the merits, an action such as this one, in which the undenied allegations of the complaint allege that the Communist Party from 1929 to 1939 did not advocate the overthrow of the Government by force and violence. The opinion of the Supreme Court of the United States in *I. W. O.* v. *McGrath*, and its companion cases, 341 U. S. 123, 71 S. Ct. 624, emphasizes the necessity for taking as true the undenied allegations of a complaint to which a motion to dismiss alone is interposed. Taking the allegations as true in this case, the decision here appealed from allows the deportation of an alien who is not and has never been an advocate of the overthrow of the Government by force and violence, who has never belonged to an organization which so advocated, who has always regarded himself as a national or citizen of the United States, and who is presently seeking to have the privilege of American citizenship conferred upon him. Unless Congress has the power to require the deportation of such an alien because he has been a member of an organization which does not advocate the overthrow of the Government, this decision is a manifest violation of due process of law, both substantive and procedural.

In *Harisiades* v. *Shaughnessy*, *supra*, the Supreme Court held that the guarantee of substantive due process in the Fifth Amendment does not preclude deportation of those who belong to organizations which did advocate the overthrow of the Government by force and violence. It held also that the First Amendment does not prohibit deportation for membership in such an organization. Impliedly, the First Amendment would and should prohibit deportation for membership in an organization about which no more is shown in the evidence than its name.

Inextricably linked with the question last discussed is the question whether the plaintiff may obtain by the

method he here sought to employ, a review of the action of the defendant under the provisions of the Administrative Procedure Act or the declaratory judgment statute. The order of deportation in this case had become final. Were he in detention, he could test that order by petition for *habeas corpus*. By the decision here appealed from the District Court has held that he may not attack the deportation order by a complaint for injunction, by an action for declaratory relief, or by an action for review under the Administrative Procedure Act. This Court has held in *McGrath* v. *Kristensen*, 340 U. S. 162, 71 S. Ct. 224, that the decision of the Attorney General in an alien case may be reviewed not only by *habeas corpus*, but also by an action for declaratory judgment. The decision of the District Court in the case at bar appears to be directly in conflict with that Supreme Court decision. Furthermore, if the rationale for the District Court's decision was that there was an indispensable party who had not been joined in the action, the decision appears to be in conflict with the Supreme Court's decision in *Williams* v. *Fanning*, 332 U. S. 490, 68 S. Ct. 188.

Other substantial questions reserved in the assignment of errors include the question of the application of the prohibition of self-incrimination of the Fifth Amendment, the application of the guarantee of freedom of speech contained in the First Amendment, and the application of the guarantee of due process of law contained in the Fifth Amendment to deportation proceedings not conducted in conformance with the Administrative Procedure Act.

Respectfully submitted,

GLADSTEIN, ANDERSEN & LEONARD,
By (Sgd.) ALLAN BROTSKY,
Counsel for Plaintiff-Appellant.

September 3, 1952.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31,671

WILLIAM HEIKKILA,

Plaintiff,

vs.

BRUCE G. BARBER, Individually and as District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District; JOHN DOE ONE, through JOHN DOE TEN, inclusive,

Defendants

JUDGMENT

William Heikkila, plaintiff herein, having applied to a judge of this court for an interlocutory injunction restraining the enforcement, operation and execution of an Act of Congress for repugnance to the Constitution of the United States, and Bruce G. Barber, defendant herein, having moved to dismiss this action, and said application and motion having been heard by this court of three judges under section 2284 of Title 28 of the United States Code, and this court having concluded that said motion should be granted, it is hereby ordered, adjudged and decreed that said motion be, and it is, hereby granted, that this action be, and it is, hereby dismissed, and that said defendant Barber recover his costs.

Dated August 4, 1952.

/S./ CLIFTON MATHEWS,
United States Circuit Judge;
/S./ LOUIS E. GOODMAN,
United States District Judge;
/S./ OLIVER J. CARTER,
United States District Judge.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 426

WILLIAM HEIKKILA,
Appellant,

vs.

BRUCE G. BARBER, individually and as District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District, et al.,
Appellees.

Appeal from the United States District Court for the Northern District of California.

BRIEF FOR APPELLANT.

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240 Montgomery Street, San Francisco 4, California,
Counsel for Appellant.

GLADSTEIN, ANDERSEN & LEONARD,
LLOYD E. McMURRAY,
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Of Counsel.

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Ex parte Fierstein, 41 F. (2d) 53 (C.C.A. 9, 1930).....46, 5
Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366.....33, 40, 4

Fletcher v. Peck, 6 Cranch. 86, 3 L. Ed. 162.....39, 4
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Garner v. Board of Public Works, 341 U.S. 716, 71 S. Ct. 909 2

Harisiades v. Shaughnessy, 342 U.S. 580, 72 S. Ct. 512.....
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Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S.
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Kessler v. Strecker, 307 U.S. 22, 59 S. Ct. 694.....14, 49, 50, 5

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Alien Registration Act of 1940, 54 Stats. 670, 8 U.S.C. 137 .....6, 49, 51

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Immigration and Nationality Act, Public Law 414, 82nd Congress, 2d Session:
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Texts

Correspondence of Karl Marx and Frederick Engels, Letter of April 18, 1883, pages 416-417, International Publishers, 1942 .....
Encyclopedia of Social Sciences:
by Oscar Jaszi:
Vol. II, p. 46 .....
Vol. II, p. 49 .....
by Sidney Hook:
Vol. XV, p. 266 .....
1 Stephen, History of the Criminal Law of England, pages 480, 481 .....
84 University of Pennsylvania Law Review at page 686....

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Appellees.

Appeal from the United States District Court for the Northern District of California.

BRIEF FOR APPELLANT.

OPINION BELOW.

The decision of the District Court for the Northern District of California, Southern Division, is unreported. No opinion was written. A copy of the judgment of the Court is attached hereto as Appendix "A."

JURISDICTION.

The judgment of the District Court was entered on August 4, 1952. A petition for appeal was presented to the District Court on September 3, 1952. The jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by Title 28 United States Code, §§1253 and 2201, and 5 U.S.C. §1009. The following decisions, among many others, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Harisiades v. Shaughnessy, 342 U.S. 580, 72 S. Ct. 512;

McGrath v. Kristensen, 340 U.S. 162, 71 S. Ct. 224;

United Public Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556.

The judgment appealed from is the judgment of a three-judge District Court, convened because the complaint directly attacked the constitutionality of certain sub-sections of the Internal Security Act of 1950, to wit, 64 Stat. 1006, 8 U.S.C. §137(2) (C), and 64 Stat. 1006, 8 U.S.C. §137-3.

QUESTIONS PRESENTED.

The District Court, three judges sitting, granted the Government's Motion to Dismiss a complaint which sought, on constitutional grounds, an injunction, declaratory judgment, and a review of administrative action, where appellant had been ordered de-

ported from the United States as having been since his entry a member of the Communist Party of the United States, and where the order was supported solely by appellant's admission, made at a prior, invalid, hearing, of former membership in the Communist Party. The questions presented are:

(1) Whether 64 Stat. 1006, 8 U.S.C. 137(2)(c), and 64 Stat. 1006, 8 U.S.C. 137-3 providing that an alien may be deported if he has at any time since entry been a member of the Communist Party of the United States, is invalid as a bill of attainder, an *ex post facto* law, and in violation of the First Amendment and of the due process clause of the Fifth Amendment to the United States Constitution.

(2) Whether the deportation order is invalid under the Fifth Amendment's prohibition of self-incrimination, because based upon appellant's own prior testimony received over appellant's objection.

(3) Whether the District Court erred in granting the motion to dismiss, where the complaint sought an injunction, declaratory relief, and a review of administrative procedure under Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009.

THE STATUTE INVOLVED.

This case attacks certain sub-sections of the Internal Security Act of 1950. The portions directly attacked are 64 Stat. 1006, 8 U.S.C. §137(2) (C), and

64 Stat. 1006, 8 U.S.C. §137-3, which provide as follows:

§137(2) (C):

"any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * * * * * *

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * * * * *

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical sub-division of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;"

§137-3:

"(a) Any Alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in paragraphs (1) or (3) of section 137 of this title or * * * a member of any one of the classes of aliens enumerated in section 137(2) of this title, shall, upon the warrant of

the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in sections 137 to 137-8 of this title, irrespective of the time of their entry into the United States."

Also important for consideration are those provisions of the Internal Security Act of 1950 which define Communist organizations and which provide for the determination of what organizations fall within those definitions by a board specially provided for that purpose. These sections are designated by the short title of the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U.S.C. 781, et seq. Significant portions of this statute are printed in Appendix "B".

STATEMENT OF THE CASE.

The case comes before this Court on appeal from a decision of a three-judge District Court granting the Government's motion to dismiss the action. No evidence was taken, and the entire record consists of pleadings. The statement of the case which follows is therefore taken from the complaint. (R. 1.) No answer having been filed to the complaint, and the case having been heard on the motion to dismiss alone, the facts stated in the complaint must, under the well-settled rule, have been taken as true by the District Court.

Plaintiff-appellant was born in Finland in 19 and came to the United States about the age of 2 months with his parents. He has ever since his a rival resided in the United States. (R. 2.) Plai tiff has pending before a state Court a petition f naturalization. (R. 5.)

In 1947 a warrant was issued for his arrest, char ing him with violation of the Immigration laws the United States in that he was alleged to be a mer ber of an organization which believed in, advised, a vocated or taught the overthrow of the Governmie by force, violence or other unconstitutional means, proscribed by the provisions of 8 U.S.C. §13

Hearings were held in 1949 before a hearing offic of the Immigration and Naturalization Service und the charge contained in that warrant. (R. 2, 3.) The hearings did not conform to the requirements of t Administrative Procedure Act, 5 U.S.C. §1001, et se Subsequently, by reason of the decision of the S preme Court of the United States in the case of *Wo Yang Sung v. McGrath*, 339 U.S. 33, 70 S.Ct. 445, tho hearings were abandoned by the Immigration Servi and new hearings were instituted before a Hearir Examiner who purported to be appointed under a to be conducting the hearings in accordance with t provisions of the Administrative Procedure Act. The hearings were held in June, 1950.

The hearing officer had before his appointment as Hearing Examiner been an employee and officer of t Immigration and Naturalization Service for mar years and had conducted investigations, prosecutio

and hearings of aliens in that capacity. The complaint alleges that the Hearing Examiner was not an impartial hearing officer in accordance with the requirements of the Administrative Procedure Act. (R. 4.)

During the course of the hearing the plaintiff was asked whether he was a member of the Communist Party. He testified that he was not. (R. 11.) He refused to testify about his membership during the years 1929 to 1939. There was then introduced in evidence, over plaintiff's objections, portions of the transcript of the testimony taken at the 1949 hearing in which plaintiff had under oath testified that he was a member of the Workers Party and the Communist Party during the years 1929 to 1939. (R. 11, 12.)

After the admission of this evidence a new charge was lodged against plaintiff, charging him with a violation of Section 22 of the Subversive Activities Control Act of 1950, (Public Law 831, 81st Congress, 2nd Session, 64 Stats. 1006, 8 U.S.C. §§137(2)(C) and 137-3, in that he was alleged to have been since his entry into the United States a member of the Communist Party. (R. 12.) All evidence relating to the nature of, and the aims or objectives of the Communist Party was stricken from the record, the decision of the hearing officer was confined to the lodged charge and supported only by the testimony given at the 1949 hearing. (R. 12, 13.)

The plaintiff offered, in the administrative hearings, to prove (and in his subsequent complaint alleged (R. 5)) that he had not advocated the overthrow of the Government, and that neither the Workers Party

nor the Communist Party had during the period when he was alleged to have belonged advocated such overthrow of the Government. The offer was rejected. (R. 6.)

An order of deportation was recommended by the hearing officer, and this recommendation was sustained through the usual administrative appeals, so that there was on January 11, 1952, a final order entered for the deportation of plaintiff, solely upon the ground that he had been found to have been a member of the Communist Party of the United States since his entry into the United States. (R. 5.)

Plaintiff sought to prevent his deportation by an action against the District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District, the defendant Bruce G. Barber, and all persons acting under his direction, or in concert with him, and the successors of the defendant or any other defendants. In addition to temporary and permanent injunctions, plaintiff sought by this complaint a declaration of rights, alleging that there existed a controversy between plaintiff and the defendants in that the plaintiff maintained that the acts and threatened acts of the defendants were illegal and void, while the defendants maintained that their actions and threatened actions were lawful in all respects. (R. 6.)

Plaintiff also sought a review of the action of the defendant Bruce G. Barber under provisions of Section 10 of the Administrative Procedure Act. 5 U.S.C. §1009. (R. 7.)

The complaint alleged that the statute under which his deportation had been ordered was unconstitutional and void as a bill of attainder and an *ex post facto* law prohibited by the provisions of Article I, Section 9, Clause 3 of the Constitution of the United States, and a deprivation of the guarantees of free speech and free press contained in the First Amendment to the Constitution of the United States, and of the guarantees of due process of law contained in the Fifth Amendment to the Constitution of the United States. (R. 6.) It was also alleged that the use of the testimony from the 1949 hearing, as the sole evidence to support the deportation order, was a violation of the guarantee against self-incrimination contained in the Fifth Amendment to the Constitution of the United States. (R. 3.)

The complaint alleged that a three-judge Court would be required for adjudication of this cause. (R. 1.)

Upon the filing of the complaint a three-judge Court was convened by Judge Clifton Mathews of the Court of Appeals for the Ninth Circuit, and a hearing was set for August 1, 1952. (R. 7.) Thereupon the defendant filed a motion to dismiss the complaint upon the ground that the complaint failed to join an indispensable party, to wit, the Commissioner of Immigration and Naturalization. The motion was also based upon the ground that the complaint fails to state a claim upon which relief can be granted, in that the issues raised by the complaint are moot since the plaintiff had been accorded a fair hearing; that

the statutes attacked are constitutional; and that the plaintiff had an adequate remedy at law. (R. 8, 9.)

Upon these pleadings, and the affidavit of George R. Andersen in support of the complaint (which set forth with some particularity the facts surrounding the introduction of the testimony from the 1949 hearing) (R. 9-13), the cause was argued before a three-judge Court consisting of Judge Clifton Mathews, of the Court of Appeals for the 9th Circuit, and District Court Judges Louis E. Goodman and Oliver J. Carter. The Court entered its judgment on August 4, 1952, denying a temporary injunction, granting the defendants' motion to dismiss, and ordering the dismissal of the complaint. No opinion was written. (R. 13.)

SPECIFICATION OF ERRORS.

The District Court erred:

1. In failing to hold the provisions of the statute here attacked, 64 Stat. 1006, 8 U.S.C. §137(2)-(C), and 64 Stat. 1006, 8 U.S.C. §137-3, were unconstitutional as bills of attainder and *ex post facto* laws in violation of the provisions of Article I, Section 9, Clause 3, of the Constitution of the United States.

2. In failing to hold that said statutes were unconstitutional and void in that they contravened the provisions of the First Amendment to the Constitution of the United States and the guarantee of due process of law contained in the Fifth Amendment to the Constitution of the United States.

3. In failing to hold that the final order of deportation deprived plaintiff of due process of law and of the protection of the Administrative Procedure Act, 5 U.S.C. §1001, et seq., by reason of the conduct of the deportation hearing by a hearing officer who had prior to his appointment as Hearing Examiner under the provisions of the said Administrative Procedure Act conducted investigations, prosecutions, and hearings of aliens and was not an impartial hearing officer.

4. In denying a preliminary injunction and a trial on the merits where the question was presented to it upon the complaint and a motion to dismiss.

5. In denying a declaration of the rights of the parties.

6. In denying a review of the action of the Immigration and Naturalization Service and of the defendant Bruce G. Barber pursuant thereto.

7. In failing to hold that the order of deportation deprived plaintiff of due process of law and violated the guarantee against self-incrimination contained in the Fifth Amendment to the Constitution of the United States, by reason of the following:

(1) The said order of deportation was supported solely by the testimony of plaintiff, where that testimony was given at a prior hearing, which said prior hearing was void and illegal because it did not comply with the Administrative Procedure Act, 5 U.S.C., §1001, et seq.; and

(2) The testimony of plaintiff which concerned plaintiff's prior membership in the Communist Party of the United States was, when given, not self-incriminating and subjected the plaintiff to no penalty; but when used in the subsequent hearing was by reason of a change in the law, self-incriminatory.

SUMMARY OF ARGUMENT.

A. THE STATUTE IS A BILL OF ATTAINDER.

The statute is a bill of attainder. It meets all criteria. The statute inflicts punishment by legislative act rather than by the judgment of a judicial tribunal; upon a class. The statute designates the class as aliens who have since entry belonged to "the Communist Party of the United States," and prescribes the punishment, deportation, for any alien determined by the Immigration and Naturalization Service to be within the class. Thus membership alone punishes. *Wieman v. Updegraff,* ..... U.S. ....., decided December 15, 1952.

Punishment is imposed without a judicial trial upon a class described not in terms of its hurtful characteristics, but by the name of an organization. Punishment is imposed upon membership in an organization, not upon wrongful activity. This is invalid. *Mahler v. Eby,* 264 U.S. 32.

It inflicts punishment. To say that deportation after long residence in the United States for the

theretofore innocent act of joining a political organization is not punishment is to couch the law in a technical jargon inconsistent with the language of the Constitution. The cases which have held that deportation is technically not punishment have considered deportation for those engaged in clearly illegal activity. To deport one for marrying, studying law, or attending mass would certainly be punishment.

B. THE STATUTE IS AN EX POST FACTO LAW.

The statute disguises a penal sanction as a civil one. The imposition of civil sanctions upon theretofore lawful activity is an invalid disguise for criminal penalties and void as an *ex post facto* law. *Burgess v. Salmon,* 97 U.S. 381; *Harisiades v. Shaughnessy,* 342 U.S. 524. In any event, the application of great constitutional safeguards should not depend upon such an indefinable distinction as that between civil and criminal law.

The statute is an *ex post facto* law because it modifies a rule of evidence. It allows the Immigration Service to impose punishment of deportation upon proof of membership alone, although the only rationale for the statute is that membership connotes subversive activity. *Calder v. Bull,* 3 Dallas 386.

The statute is retrospective in operation. Membership in the Communist Party was never proscribed by Congress upon pain of deportation until 1950.

When Congress passed the Alien Registration Act of 1940 in response to *Kessler v. Strecker*, 307 U.S. 22, it intentionally failed to provide that past membership in the Community Party was a ground for deportation.

C. THE STATUTE VIOLATES THE FIRST AND FIFTH AMENDMENTS.

The plenary power to deport is not involved in the case. When the Constitution says, "No Bill of Attainder or ex post facto Law shall be passed," this limits Congress as to the means it may use to attain a permissible end, and deprives Congress of the power to enact this statute.

The political nature of the power to deport does not exempt this statute from judicial review, nor congressional statutes from positive constitutional prohibitions. If this is not so, then the political power informing this and similar statutes extends not only to deportation of aliens, but to deprivation of constitutional rights of Communists or any other group deemed hurtful to United States security in the political judgment of the Congress. The political power of legislatures does not extend that far. *Wieman v. Updegraff, supra.*

D. THE DEPORTATION ORDER VIOLATES THE PRIVILEGE AGAINST SELF-INCRIMINATION.

The deportation order in this case is based solely upon the admission of appellant given during an invalid administrative hearing, that he had been a prior member of the Communist Party. It was given when he had no reason to invoke the privilege against self-incrimination. He did not intend thereby to waive the privilege. *Amos v. United States,* 255 U.S. 313. When a subsequent change in law made his claim of the privilege proper, the introduction of his prior testimony over his objection compelled him against his will to testify against himself, in violation of the Fifth Amendment to the Constitution.

E. THE COURT BELOW DENIED DUE PROCESS OF LAW IN GRANTING A MOTION TO DISMISS THE COMPLAINT.

Where the complaint sought declaratory judgment, a review of agency action under the Administrative Procedure Act, and an injunction, it was error to grant a motion to dismiss. *McGrath v. Kristensen,* 340 U.S. 162; *United States ex rel Trindler v. Carusi,* 166 F. (2d) 457 (3. Cir.). To grant a motion to dismiss in the face of undenied allegations that the petitioner had never, and the Community Party had not during his membership, advocated overthrow of the Government by force and violence; that the sole support for the order of deportation was appellant's testimony obtained in violation of the guarantee against self-incrimination; and that his hearing was

conducted by a hearing officer who was not impartial, was a denial of due process of law. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123.

ARGUMENT.

A. THE STATUTE IS A BILL OF ATTAINDER.

In the Subversive Activities Control Act of 1950 Congres provided in Section 22 for the first time in the history of the United States that an alien could be deported if at any time since his entry into the United States he had become a member of the Communist Party of the United States. Under this statute the Immigration and Naturalization Service seeks, by an order made in 1952, to deport an alien who was admittedly a member of the Communist Party from 1929 to 1939. This admission alone is said to support the order of deportation.

1. Punishment is imposed upon a class.

By the familiar cases a bill of attainder is defined as a statute which imposes punishment upon named individuals or the members of an easily identified class. See *United States v. Lovett*, 328 U.S. 303, 66 S. Ct. 1073. The question of whether deportation is punishment is discussed below. For the purpose of the immediate argument, it is assumed that deportation is punishment.

The class upon which this punishment is visited is denominated "members of the Communist Party of the United States" who are aliens. The significant aspect of this designation is that it differs from all

other designations of deportable aliens which have heretofore been upheld as constitutional by this Court. As Mr. Justice Reed remarked in the *Carlson* case, supra,

> "Theretofore there was a provision for the deportation of alien anarchists and other aliens, who are or were members of organizations devoted to the overthrow by force and violence of the Government of the United States, but the Internal Security Act made communist membership alone of aliens a sufficient ground for deportation." 72 S. Ct. 531.

The description of this class differs from other descriptions of deportable aliens in our deportation statutes, *because it describes a political group, and not the characteristics which are deemed by Congress to indicate that an alien with such characteristics is an undesirable resident within our borders.*

Congressional designation of an undesirable class has been upheld where it set forth the underlying criteria used. In *Mahler v. Eby*, 264 U.S. 32, 44 S. Ct. 283, the Court was concerned with the deportation of two aliens who had been convicted of a violation of the Selective Service Act and the Espionage Act. The delegation of power to the Secretary of Labor to deport those who had been thus convicted, whom he found to be undesirable residents of the United States, was attacked as so vague and uncertain that it left the liberty of the alien to the whim and caprice of an executive officer in violation of the due process clause of the Fifth Amendment. Rejecting this view the Court said:

> "With the background of a declared policy of Congress to exclude aliens *classified in great detail by their undesirable qualities* in the Immigration Act of 1917, and in previous legislation of a similar character, we think the expression 'undesirable residents of the United States' is sufficiently definite to make the delegation quite within the power of Congress." 264 U.S. at 40. (Our emphasis.)

Congress has heretofore provided deportation for anarchists. In the *Carlson* case this Court, although concerned only with the question of detention without bail pending determination of deportability, remarked that the bar against the admission of Communists cannot be differentiated as a matter of power from that against anarchists which was upheld in 1904 in *Turner v. Williams,* 194 U.S. 279, 24 S. Ct. 719. The designation of anarchists, however, is a designation of those who have certain political and philosophical views, not those who belong to a certain organization. In the *Turner* case the Court construed the language of the Act as defining anarchists by the language which followed that word in the statute as "persons who believe in or advocate the overthrow by force and violence of the government of the United States or of all government or of all forms of law, or the assassination of public officials." 194 U.S. at 293.

Indeed, the only question in the *Turner* case, as the Court viewed it, was whether Congress had the power to exclude all alien anarchists when some anarchists were merely political philosophers whose teachings

are beneficial rather than otherwise. The decision of the Court turned upon its conclusion that Turner "contemplated the ultimate realization of his ideal by the use of force, [and that] his speeches were incitements to that end."

The Court nevertheless discussed the possibility that the anarchists excluded from the United States by the statute included those whose views were those of political philosophers innocent of all evil intent. The statute it found was valid even under that interpretation, saying:

> "It would follow that Congress was of the opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold *and advocate* them would be undesirable additions to our population * * *" 194 U.S. at 294. (Emphasis supplied.)

Thus it was the description of the class by a description of the *acts done* by the members of the class that was sustained in the *Turner* case.

Indeed, when the Secretary of Labor, in the *Mahler* case, attempted to avoid the necessity for making a finding that the aliens were undesirable residents, the Court sent the case back. The Court noted that the Secretary concluded that a finding was not essential to the deportation of these aliens. It said:

> "Indeed, he seems to have used forms applicable to aliens of a fixed excluded class, *to be deported on identification with the class*, without any further finding by him. The natural construction of his language is that he has become satisfied that they are in the country in violation of the act

solely because they have been convicted as stated." 264 U.S. at 44. (Emphasis supplied.)

Such a deportation order could not be sustained, the Court held, "* * * not only on the language of the statute, but also on general principles of constitutional government." 264 U.S. at 44.

No serious student of political theory could suppose that communists as political theoreticians are the same as the anarchists condemned in the case of *Turner v. Williams*, 194 U.S. 279, 24 S. Ct. 719. *The Encyclopedia of the Social Sciences* says in an article by Oscar Jaszi:

> "Anarchism—There is perhaps no other chapter in the history of social-political ideas which has caused so much confusion to the specialist as well as to the general public as the anarchist doctrine. Anarchism covers so many distinct conceptions and tendencies that it is difficult to reduce them all to a common denominator. Besides, it is not so much a definite scientific theory as a mass ideology colored by many emotional and religious elements. It can in general, however, be defined as an attempt to establish justice (that is, equality and reciprocity) in all human relations by the complete elimination of the state (or by the greatest possible minimization of its activity) and its replacement by an entirely free and spontaneous cooperation among individuals, groups, regions and nations." Vol. II, p. 46.
>
> "Modern anarchism assumed new tendencies in the pamphlets, speeches and propaganda of Michael Bakunin, with whom anarchism took a definitely collectivist form. He approved con-

mon ownership in land and other means of production, but retained private ownership in consumption goods and repudiated emphatically the state socialism of Marx." Vol. II, p. 49.

Sidney Hook, writing in the same *Encyclopedia* on the subject of violence, says the following:

"The nature and role of violence in Marxian theory and practice represent an attempt to mediate the dual impracticalities of pacifism and 'putschism'. Before the influence of Marx and Engels made itself felt on the socialist movement, the dominant political tendencies within it subscribed either to the philosophy of moral force or to that of direct action. Marx' philosophy of the state and his conception of political tactics, which made the main line of revolutionary strategy dependent upon objective social conditions, cut under both of these tendencies. Against those who pinned their faith solely upon moral force Marx pointed to the non-moral reality of the state as the governmental arm of the nation's industry and to its source of power in the existence of special bodies of armed men not part of the working population but standing over against it. It followed that any attempt to capture state power must be prepared to meet the state forces if necessary on their own ground. Against the direct actionists and all believers in the propaganda of the deed Marx argued that violence could succeed only when the social conditions ripe for a new order were at hand; that it must cap the process of organization of labor and not precede it; that if it took the customary individual form rather than a social form it invariably played into the hands of the reaction. Ad-

vocacy of such tactics could therefore be characterized either as the expression of irresponsible petty bourgeois anarchism or as downright police provocation. It would perhaps be no exaggeration to say that it was due to the spread of Marxist ideas among the working classes that individual acts of terror and violence almost disappeared from the labor movement in Western Europe. In Russia the spread of Marxism among the prerevolutionary intellectuals at the turn of the century and thereafter also led to a marked decline in terrorism. In Latin countries like Italy and Spain, where Marx' ideas did not strike deep root, anarchist syndicalist notions prevailed and labor disturbances took on an incipient revolutionary character. Even in the United States labor disputes which were caried through without the guidance of a broad social philosophy were accompanied by spontaneous individual violence which surpassed anything known abroad.

"Marxism holds that the chief objection to individual expression of violence or premature violent action on the part of working class groups is that such expressions invariably facilitate the policy of governmental repression. The objective presupposition of any violent action is a revolutionary situation defined as one in which there is chaos in economic life and in which the traditional psychology of all classes is demoralized. Revolutionary action is not begun unless there is reason to believe that a majority of the population stands behind the representative councils of workers and the producers in whose name power is taken. The amount of violence which must be employed is a function of the intensity of resistance which is encountered. For Marxism the

moral and social justification of the use of violence consists in the fact that it is a measure of defense on the part of the majority of the community against the horrors of war, poverty and political repression and aims to establish the political conditions under which the transition from a profit to a use economy may be effected." Vol. XV, p. 266.

See also letter of Engels to van Patten, dated London, April 18, 1883, pages 416-417, *Correspondence of Karl Marx and Frederick Engels*, International Publishers, 1942:

"Since 1845 Marx and I have held the view that *one* of the ultimate results of the future proletarian revolution will be the gradual dissolution of the political organization known by the name of *state*. The main object of this organization has always been to secure, by armed force, the economic oppression of the labouring majority by the minority which alone possesses wealth. With the disappearance of an exclusively wealth-possessing minority there also disappears the necessity for the power of armed oppression, or state power. At the same time, however, it was always our view that in order to attain this and the other far more important aims of the future social revolution, the working class must first take possession of the organized political power of the state and by its aid crush the resistance of the capitalist class and organize society anew. This is to be found already in the Communist Manifesto of 1847, Chapter II, conclusion.

"The anarchists put the thing upside down. They declare that the proletarian revolution must *begin*

> by doing away with the political organization of the state. But after its victory the sole organization which the proletariat finds ready in existence is precisely the state. This state may require very considerable alterations before it can fulfill its new functions. But to destroy it at such a moment would be to destroy the only organism by means of which the victorious proletariat can assert its newly-conquered power, hold down its capitalist adversaries and carry out that economic revolution of society without which the whole victory must end in defeat and in a mass slaughter of the workers similar to those after the Paris Commune.
>
> "Does it require my express assurance that Marx opposed this anarchist nonsense from the first day it was put forward in its present form by Bakunin? The whole internal history of the International Workingmen's Association is evidence of this."

The quotations above demonstrate not only that there is a marked difference between anarchists and communists as political theoreticians, particularly with regard to their attitude toward violence. They demonstrate also that despite the findings of Congress with regard to communists, and the conclusion of the District Court in *Harisiades v. Shaughnessy*, 90 F. Supp. 397, that the literature of Marxism generally indicates advocacy of violent overthrow of government, nevertheless a serious student of the subject may come to a different conclusion on that point. Certainly it is no secret that in all of the recent Smith Act trials the asserted position of the

defendants has been that they did not and that Marxist theory does not advocate such overthrow. Even so exhaustive a culling of Marxist literature as that performed by Judge Leibell in the *Harisiades* case, cited above, does not negative conclusively the proposition that the communists maintain that force and violence is to be used, if at all, only by the majority against the minority, when the minority resists the majority's attempt to achieve peaceable change in government.

Any review of this literature will at once raise the question how an individual member of an organization so widespread, so prolific in its writings, so vocal on so many public issues over the entire course of its existence, can possibly be held to know, with certainty, the exact doctrines which it advocates.

The position of an organization on a public question is always extremely debatable. The disagreement which recurs every election year about the meanings of the platforms of the various political parties should sufficiently illustrate this. If by way of analogy this Court were regarded as an organization, even though it consists of only nine members, it is clear that there is vast disagreement among its members about the position the Court has taken on the innumerable questions upon which it has passed. This extends not only to its prior pronouncements, but even in the very course of deciding a case.

While all of the justices would doubtless agree that this Court has as its purpose and objective to

assure that the decisions of courts and the acts of the legislative and executive branches of the government are in accordance with constitutional law, the doctrines of constitutional law applied by the Court to particular problems is frequently the matter of bitter debate. Thus one justice may be of the opinion that the Court has in recent cases watered down constitutional guarantees of individual liberty at the expense of individuals for the enhancement of the power of the government. Other members of the Court would doubtless emphatically disagree. The purpose and effect of the Court's position and action on a particular problem thus depends upon whose view is accepted.

As a hypothetical case, imagine a Congressional finding a decade hence, embodied in penal legislation, to the effect that a conspiracy had existed in the 5th decade of the century among government officials to knowingly subvert and deny to the people of the United States their constitutional rights; suppose further that Congress found that among the methods used to carry out this conspiracy were decisions of this Court which weakened individual constitutional liberties to the advantage of the Government; how should members of the Court be judged in prosecutions under such a statute?

Should the defendants in such a case be allowed to litigate the question whether the decisions in which they had participated had weakened constitutional rights? If they were allowed to do that, should they further be allowed to determine the issue of individ-

ual *scienter?* Or should the Congressional finding be conclusive as to the effect of the decisions, and the question of *scienter* ruled out as immaterial? In Heikkila's case, he was allowed neither to show that the organization had not advocated the overthrow of the Government by force and violence, nor that he had not knowingly belonged to an organization which so advocated. He has been concluded by the Congressional finding as to both the advocacy of the group and his individual knowledge of it. Assuming that the Communist Party did during Heikkila's membership advocate the overthrow of the Government by force and violence, he may have believed that it did not, just as earnestly as members of this Court believe that its decisions in recent cases have not watered down constitutional liberties to enhance the power of the central government. If he has that belief (and he has alleged that he does have it), it is of no avail to him under this statute.

The difficulty of ascertaining the nature and objectives of an organization has been recognized in the very statute which is here attacked. In Section 22 of the Act, cited in its codified form in an appendix, the Congress has set up an elaborate procedure for determining the question whose answer is assumed, in the sections here attacked as a bill of attainder, to be known to every Communist. Thus in Section 792(e) of Title 50, U. S. Code, are set forth eight criteria, many of them multiple, for determining whether an organization is a Communist-action organization, and in subsection (f) of the same section,

four criteria for determining whether an organization is a Communist-front organization. A brief examination of these provisions of the statute as they appear in the appendix will demonstrate the difficulty of supposing that an individual member could with certainty know precisely what the published or secret attitudes of the organization toward public questions might be.

Thus the criteria include: The extent to which the organization's policies are formulated and carried out pursuant to directives or to effectuate the policies of a foreign organization or foreign government; the extent to which its view and policies do not deviate from those of such foreign government or foreign organization; the extent to which it receives financial aid from such foreign sources; the extent to which it sends members or representatives to a foreign country for instruction or training; the extent to which it reports to such foreign government or organization; the extent to which "its principal leaders or a substantial number of its members" are subject to or recognize the disciplinary power of such foreign government or organization; the extent to which it fails to disclose its membership, or to which its members refuse to acknowledge membership therein, or to which it fails to disclose information other than membership lists, or the extent to which it operates on a secret basis, all for the purpose of concealing foreign direction, domination, or control; the extent to which its principal leaders or a substantial number of its members consider the allegi-

ance they owe to the United States as subordinate to their obligation to such foreign government or organization.

When it is remembered that according to the findings of the Congress as set forth in the first section of the Subversive Activities Control Act, a communist organization is a criminal conspiracy, then it is entirely clear that very few of the members of such a secret conspiratorial organization could know the things which are required to be known, with certainty, in order to be aware of the views and program of the organization.

The requirement that certain knowledge of the nature and objectives of a proscribed organization be known to one punished for membership is underlined by the concurring and dissenting opinion of Mr. Justice Frankfurter in *Garner v. Board of Public Works*, 341 U.S. 716, 726, 71 S. Ct. 909, 915:

> "* * * This ordinance does not ask the employee to swear that he 'knowingly' or 'to the best of his knowledge' had no proscribed affiliation. Certainty is implied in the disavowal exacted. The oath thus excludes from city employment all persons who are not certain that every organization to which they belonged or with which they were affiliated * * * at any time since 1943 has not since that date advocated the overthrow by 'unlawful means' of the Government of the United States or of the State of California."

These considerations underline the theory of appellant that a statute which proscribes, on pain of de-

portation, *membership in an organization* rather than *activity of a certain sort*, is by its nature unfair, punishing, and the very exemplar of the target at which the writers of the Constitution aimed the prohibition: "No Bill of Attainder or ex post facto Law shall be passed." United States Constitution, Article I, Sec. 9, Clause 3.

2. Punishment is inflicted by legislative act.

By the familiar decisions it is laid out that a bill of attainder punishes by a legislative act rather than by the judgment of a judicial tribunal. The fact of legislative punishment has been found where the legislature described a certain class, any member of which upon being identified would then be subject to execution or pains or penalties prescribed by the bill. See the *Cummings* decision, 4 Wall. 333.

In the case at bar the class of aliens described is identified by the name of a political organization, "the Communist Party of the United States". 64 Stat. 1006. Any person who is identified as being a member of that group is immediately upon that identification subjected to the punishment of deportation. By the terms of the statute and as the statute was applied in the case at bar, no inquiry is relevant in the case of an alien accused under this Act except the inquiry, "Was he at any time after his entry into the United States a member of the Communist Party of the United States?"

As this Court said in *Wieman v. Updegraff*, ... U.S. ....., supra, speaking of an Oklahoma statute

prescribing a loyalty oath for public officers and employees,

> "* * * The fact of membership alone disqualifies. If the rule be expressed as a presumption of disloyalty, it is a conclusive one."

The legislature has therefore inflicted punishment. The purely ministerial act of identifying members of the group thus penalized is entrusted to executive officers. The executive officers, however, have no discretion in the matter. The punishment is declared, and the means for its execution are prescribed by the Congress.

When William Heikkila was identified, by his own testimony, as a member of the proscribed organization, there was no choice given by this law to impose any punishment except that set forth in the statute—to be taken into custody and deported.

3. Punishment is imposed without a judicial trial.

The vice of punishment by the legislature is that the punishment is imposed by the legislative rather than the judicial branch of the government—that is, there is no judicial trial in which the commonly applicable rules of criminal and civil law apply. In the case at bar the legislature relies upon the Immigration and Naturalization Service of the Department of Justice, a branch of the executive department of the government, to carry out the imposition of the penalty. The only inquiry is as to the identification of the individual with the proscribed class. No consideration is given to the question of *mens rea;* no

jury sits; no judicial review is allowed. *Carlson v. Landon,* 342 U.S. 524; 72 S. Ct. 525. Upon identification, the punishment is automatic.

In the case at bar the identification of Heikkila was achieved by a trick or trap. His prior testimony regarding membership, transcribed, was introduced in evidence although it was not material to the issues then framed by the charges. The theory upon which its admission was sought and allowed was that such immaterial evidence, when admitted, would allow the lodging of a new charge changing the issues. (R. 10, 11.) And by the already admitted evidence the new charge would immediately be proved.

Such procedure is not judicial procedure. It is not, of course, defended or excused as judicial procedure. Its sole justification is that this is not a trial, but an administrative act of identification. To change the issues in the midst of a criminal trial would be clearly a violation of the right of due process, of notice and an opportunity to prepare a defense. But here, says the Government, what harm is done? The procedure has no effect on the determination of the issues, *for it is not guilt which is in issue.* That has already been determined by Congress. If guilt is known beforehand, and cannot be disputed, no defense is available. Procedure which is objectionable because it deprives one of opportunity to defend is perfectly satisfactory where no defense is allowed.

Thus would the Government justify its deportation order. The argument is cogent only because the trial took place in Congress, and the issue of guilt was adjudicated there.

4. It inflicts punishment.

As defined by this Court in numerous cases, a bill of attainder must be a statute which inflicts punishment. Deportation has been held to be a civil, rather than a criminal, sanction. *Mahler v. Eby,* 264 U.S. 32, 44 S. Ct. 283. That it may be punishment although civil in nature is, however, clearly established by those cases which have condemned legislative acts as bills of attainder.

In *United States v. Lovett,* 328 U.S. 303, 66 S. Ct. 1073, proscription from government employment by a statute which directed that none of the monies appropriated for the expense of the government should be used to pay the salaries of certain named government employees was held to be punishment. In *Cummings v. Missouri,* 4 Wall. 277, 18 L. Ed. 356, it was held that prohibiting one from following the occupation of a priest and teacher unless he first took an expurgatory oath was punishment. 18 L. Ed. at 362. In *Ex parte Garland,* 4 Wall. 333, 18 L. Ed. 366, decided the same day as the *Cummings* case, a rule of the Supreme Court of the United States prohibiting the practice of law by attorneys before it, unless they first took an expurgatory oath, was found to impose punishment. 18 L. Ed. at 370. In *Burgess v. Salmon,* 97 U.S. 381, 24 L. Ed. 1104, the collection of a tax on tobacco prior to the effective date of a statute which imposed the tax was civil punishment. 24 L. Ed. at 1106.

The punishment imposed even in the English bills of attainder was not always criminal. Thus this Court quoted in the *Cummings* case, 18 L. Ed. at 362, the

statute of 1 *George I*, Chapter 13, setting forth the class to whom the statute applied. Among other punishments, it provided a civil penalty of £500 to be recovered against any member of the class by anyone who sued for it. The statutes 9 and 10 *William III*, Chapter 32, also cited, imposed civil disabilities of incapacity for public office, and inability to sue in the civil courts.

Long before our Constitution was written, exile and transportation were penalties imposed for crime. See 1 *Stephen, History of the Criminal Law of England:*

> "* * * The punishment was unknown at common law, though in one case exile was at common law a consequence of crime. This happened when a criminal took sanctuary and confessed his crime. Upon this he was allowed to leave the kingdom, taking an oath of abjuration, as it was called, which bound him never to return; but sanctuary and abjuration were both abolished by 1 Jas. 1, c. 25, and 20 Jas. 1, c. 18. The earliest instances of transportation as a punishment seem to have occurred in the reign of Charles II, when pardons were granted to persons capitally convicted conditionally on their being transported for a number of years—usually seven. This practice was recognized, as I have observed, by the Habeas Corpus Act, and greatly extended by subsequent legislation, and particularly by the Act of 1768. It was first legalized as a substantive punishment by the Act of 4 Geo. 1, c. 11, already mentioned. In the course of the eighteenth and the early part of the present century an immense number of Acts were passed by which various terms of transportation, with alternative terms of imprisonment, and power, in some cases alter-

native and in other cumulative, to order whipping more or less frequently, were allotted to particular offences.". At page 480.

That transportation, like deportation, might be without temporal limit appears at page 481:

"In their Seventh Report the Criminal Law Commissioners refer to many instances of these capricious variations. They say, for instance, 'In seventeen different classes of cases the sentence may be transportation for life; in two the punishment is absolute without any alternative. In another, power is given to transport for any other term without fixing any minimum term of transportation or any alternative term of imprisonment. Of the fourteen other classes in one only is the minimum of transportation fifteen years.' 'In one case only is the minimum term of transportation ten years. We find fifteen varieties in punishments where the maximum is transportation for a term of fourteen or fifteen years. The instances in which the punishment of transportation for seven years may be inflicted present twenty-three varieties.' "

It is not argued here that transportation and deportation are precisely the same. They present, however, the same punishing aspect—exile from the nation in which the convicted one sought to remain.

When laws which prohibited one from following a chosen profession unless one took an expurgatory oath, or imposed fiscal penalties, are by the decisions of this Court punishment, it is shocking to deny that banishment from this country, after long residence here, is punishment. To deny that it is punishment,

at least in the popular sense, is to deny that the right or privilege of residing permanently in the United States is of more than trifling value. In the case of the appellant at bar, who came to the United States at the age of 2½ months and has never departed from it, to thrust him from the national community in which he has lived all but a few weeks of his life and to place him in a nation wholly as foreign to him as if he had never been there, cannot fail to qualify as punishment. He has sought United States citizenship. His deportation would mean that he cannot attain that status. To deny that depriving him of his opportunity to become a citizen of the United States is punishing him is to deny that American citizenship is a priceless possession.

It is possible, and in some of the past decisions of this Court it has been done, to present a circular argument in which one defines punishment in a technical and legalistic sense, so that it excludes the type of punishment before the Court. Thus one can say, "Punishment forbidden by the prohibition against bills of attainder is criminal punishment. This is not criminal punishment. Therefore this punishment is not forbidden." This type of argument, while it cannot fail, cannot convince.

It is true that in several cases this Court has rejected an attack on deportation statutes as bills of attainder by stating that deportation is technically not punishment. Thus Mr. Justice Holmes was able to say in *Bugajewitz v. Adams*, 228 U.S. 585, 33 S. Ct. 607, that deportation was not a punishment but

"simply a refusal by the government to harbor persons whom it does not want." He was there dealing with the question of the power to deport a prostitute. In other cases, aliens similarly undesirable because of illegal activity have been held deportable partly on the theory that deportation was not punishment.

It is impossible, however, to separate the act which is punished from the punishment, when examining the statute for its possible repugnance to the Constitution. It has never been held that it is not punishment to deport one for joining an organization, an act which Mr. Justice Frankfurter finds to be one of our national characteristics. (*Wieman v. Updegraff*, ... U.S. ....., decided December 15, 1952.) Likewise, it is unthinkable that it could be held that it would not be punishment if one were deported for entering into marriage, studying law, or attending mass. Such supposed decisions would only convince the people of the United States that law paid no attention whatever to reality.

If law, particularly constitutional law, is not to be couched in a refined and technical jargon incomprehensible to the governed of this nation, and intelligible only to those familiar with concepts far removed from the broad language of our fundamental law, deportation for an innocent act must be recognized as punishment.

Heikkila has grown from infancy to ripe manhood in the United States. His only ties with the Old World are ancestral. Since memory begins about age

4, he is psychologically as American as any Son
the American Revolution. Can the law courts s
to him and to the rest of the Americans that to ex
him from all he has ever known of organized soci
is not an act of punishment?

If it is the duty of this Court to keep the decisio
of the lower courts and the Acts of Congress cons
nant with the Constitution, it is no less its duty
see that the law speaks as clearly and honestly as th
document. That duty demands recognition that exi
is indeed punishment of the severest sort.

B. THE STATUTE IS AN EX POST FACTO LAW.

1. It disguises a penal sanction as a civil one.

Since *Calder v. Bull*, 3 Dallas 386, 1 L. Ed. 6
(1798), the classic definition of an *ex post facto* la
has been as follows:

(a) Every law that makes an action done befo
the passing of the law and which was inn
cent when done, criminal; and punishes su
action;

(b) Every law that aggravates a crime or mak
it greater than when committed;

(c) Every law that changes the punishment a
inflicts a greater punishment than was a
nexed when the crime was committed;

(d) Every law that alters the legal rules of ev
dence, and receives less, or different, tes
mony, than the law required at the time
the commission of the offense, in order
convict the offender.

Because it was not a penal statute, this Court in *Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525, rejected the argument that the section of the Subversive Activities Control Act which specified deportation for one who had been a member of an organization that advocated overthrow of the government by force and violence was an *ex post facto* law. Doubtless many cases have held that unless the statute was penal it could not fall under the prohibition against *ex post facto* laws condemned in the Constitution, Article I, Sec. 9, Clause 3.

The Court has, however, never been at a loss to find an *ex post facto* law in a statute which was not in terms a criminal statute when it found the statute fulfilled the underlying requirement of unfairness, retrospective operation, and the imposition of punishment combined.

In the *Carlson* case the Court found that there was no retrospective operation of the statute because it had not modified the law which had been in effect for many years proscribing membership in organizations which advocated the overthrow of the government. Thus the Court found there was lacking that element of retroactive unfairness which is necessary to bring the case within the prohibition.

In *Fletcher v. Peck*, 6 Cranch, 86, 3 L. Ed. 162, the Court found that a statute was an *ex post facto* law which forfeited the estate of Fletcher by invalidating a contract. In *Burgess v. Salmon*, 97 U.S. 381, 24 L. Ed. 1104, the imposition of a tax under a statute which also allowed criminal prosecution for its eva-

sion was held to be an *ex post facto* law. In *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356, *Pierce v. Carskadon*, 16 Wall. 234, 21 L.Ed. 276, and in *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366, similar decisions were reached by this Court.

This Court in *Harisiades v. Shaughnessy*, 342 U.S. 524, 72 S. Ct. 512, noted that in *Burgess v. Salmon*, supra, the Court had explained the cases cited above as proceeding upon the view that "Novel disabilities there imposed upon citizens were really criminal penalties for which civil form was a disguise." 72 S. Ct. at 522. There was nothing novel, however, about the punishments that were inflicted by the statutes condemned in those cases, if by novel is meant something unknown to the law. Expurgatory oaths were known in England before the American Revolution and commented upon by this Court in the *Cummings* case. Statutes which invalidated contracts were certainly nothing new at the time *Fletcher v. Peck*, supra, was decided. Proscription from government employment was not unknown at the time of the decision in *United States v. Lovett*, 328 U.S. 303, 66 S. Ct. 1073.

What then was novel? It was the imposition of punishment for acts which had not prior thereto been punishable, and which were lawful acts which no one could have known were performed at his peril. So in the case at bar, Heikkila joined the Communist Party. It was and is his view that the Communist Party was a political organization which did not advocate the overthrow of the Government of the United States by force and violence. At the time he joined it in 1929, at the time that he left it in 1939,

and in fact up until 1950, no statute stated that membership in that organization was illegal or a ground for deportation. In fact, as late as 1942, the Supreme Court of California (*Communist Party v. Peek*, 20 Cal. (2d) 536) decided that the provision of the Election Code of California, Section 2540.4, denying participation in primary elections to any party affiliated with the Communist Party of the United States or the Third Communist International, was unconstitutional; that the Court could not take judicial notice that the Communist Party advocated overthrow of the government by force; that the Communist Party had a constitutional right to place its candidates upon the ballot in California.

Only by the possession of a supernatural power to foresee the future could Heikkila have known that the act of joining a recognized, legitimate, active political organization which regularly advanced candidates for public office, would one day be regarded as grounds for his deportation. Nor was Heikkila alone in this blindness to the future. It is doubtless no bold statement to say that in 1939 and for the decade preceding it, few students of law would have predicted that participation in legitimate political activity would subject one to punishment more than a decade later. Participation in political activity was then regarded as the mark of a good and active citizen or resident.

It is, therefore, at least as novel to punish a man for joining a political organization as it was to ban one from federal employment on the basis of one's activities as an employee of the federal government,

as in *Lovett,* supra, or to bar one from teaching or practicing law because one had engaged in insurrection against the Republic, as in *Cummings* and *Garland,* supra. Those punishments were penal in disguise. So is this.

At any rate, to say and to mean that one's constitutional rights are determined by whether a statute which seeks to deprive one of them is a criminal or a civil statute, is to hide behind empty words. The distinction between civil and criminal legislation is clear only in enactments that deal with the obviously criminal or the obviously civil. Many statutes and rules of law are at the blurred edges where a valid argument can be made either way. Such lump concept thinking should not determine whether the freedoms guaranteed by our Constitution are available or not.

A brief and lucid description of the futility of attempting to draw a sharp line between the civil and criminal law appears in M. R. Cohen's article in 84 *University of Pennsylvania Law Review* at page 686. The article is entitled *"On Absolutisms in Legal Thought."* He says in part:

> "As regards substance and as regards procedure the civil and the criminal law overlap so that it is impossible to say with absolute precision where one begins and the other ends. As to substance, few today will venture to assert that all criminal acts involve greater moral turpitude than the frauds and other acts which constitute torts. Nor can we maintain the old view that the criminal law deals with acts which en-

danger the common welfare while the civil law deals with what is of interest only to private individuals. The general social interest in the maintenance of proper family relations, of proper industrial relations and the like, is certainly as great as that involved in the protection offered by large parts of the criminal law against various misdemeanors. Indeed, are not the same interests often protected in both ways, and are there not many acts which are both civil and criminal wrongs? As to the difference of procedure, it is easy enough to call certain procedures criminal and others civil, but not easy to define the difference. The layman who generally thinks of crimes as serious felonies like murder and robbery, naturally says that criminal prosecutions are brought by officers of the state who are in duty bound to do so, whereas a private action is brought by an individual at his option. But leaving aside the classic common-law forms of private prosecution for criminal offenses and the fact that in England the Attorney-General can still prosecute certain cases of tort, we still face the fact that an action for the collection of land tax, or other obligation to the government, may take the form of a civil suit. Despite all sorts of theoretical differences, such as the different degrees of evidence required, such civil actions do not in effect differ very much from prosecutions to enforce penalties for certain misdemeanors. Nor can the sentence which results from criminal procedure be always sharply distinguished from the judgment in a civil action. To be sure, no civil action any longer terminates in death or imprisonment, as the old Roman and Teutonic law often did. Yet even today, imprisonment for certain kinds of debts, for non-pay-

ment of alimony, and for contempt of court often grows out of civil procedure. Nor are the fines of the criminal law necessarily more severe than the civil damages that are frankly recognized as punitive. Consider, for instance, the triple damages paid by the Danbury union hatters under the Sherman Anti-Trust Law. In some cases this meant the loss of home and all of a life's savings. Can we doubt that this was a punishment more severe than that for many misdemeanors? Men sometimes prefer to go to jail rather than pay certain fines, and the appointment of receivers to take charge of one's business is sometimes regarded as even worse."

In the field of deportation law a striking example of the concurrence of civil and criminal penalties is provided by Section 266 of the Immigration and Nationality Act. Public Law 414, 82d Congress, 2d Session.

It is provided in subsection (b) of Section 266 that an alien who fails to give written notice to the Attorney General as required by Section 265 of the title shall be guilty of a misdemeanor, and upon conviction be fined not to exceed $200 or imprisoned not more than thirty days, or both. It is then provided that irrespective of whether an alien is convicted and punished as so provided, any alien who fails to give written notice to the Attorney General as provided by Section 265 is to be taken into custody and deported, unless such alien establishes to the satisfaction of the Attorney General that his failure was reasonably excusable or was not wilful. Thus the penalty of deportation may be imposed either for

conviction of a crime, or for the same act without conviction. In both civil and criminal procedures under this section the question of wilfulness would be pertinent. Deportation might, therefore, be an immediate consequence of conviction. Deportation might also be the consequence of the same act without the conviction.

The statute here attacked is a criminal statute in the sense in which that term has been used in cases holding the statutes invalid because they were *ex post facto* laws.

2. The statute modifies a rule of evidence.

At least since the rule was announced in *Calder v. Bull*, 3 Dallas 386, 1 L. Ed. 648 (1798), one of the earmarks of an *ex post facto* law has been that it modifies a rule of evidence so that less evidence is required for a conviction than was the case before the statute was enacted. It is true that the cases use the language of the criminal law when they speak of "conviction." The principle underlying the rule, however, is the same as that underlying the prohibition against *ex post facto* laws in general. Not that a penalty, labelled "criminal", is imposed after a conviction obtained by less evidence than was necessary at the time the act was committed, but that a pain, penalty, or punishment has been imposed which the actor had no reason to expect at the time he committed the act. If, as this Court found in *Burgess v. Salmon*, 97 U.S. 381, 24 L. Ed. 1104, statutes may be *ex post facto* laws where no admittedly criminal

penalty is imposed, then the prohibition may apply where a rule of evidence is modified so that a punishment may be imposed although the punishment is disguised as a civil penalty.

If there is any rationale whatever to the statute here under review, it is that the Communist Party of the United States is, and at all times has been, an organization which advocated the overthrow of the Government of the United States by force and violence. It was proof of this question which, until the passage of the Subversive Activities Control Act of 1950, occupied the efforts of prosecuting attorneys in criminal syndicalist and deportation cases where the alien was alleged to be a member of the Communist Party. See *Ex parte Fierstein*, 41 F. (2d) 53 (C.C.A. 9, 1930).

In *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S. Ct. 512, the language of the Court about the advocacy of forcible change by admitted Communists was based upon a *finding* approved in each case by the court below and not questioned on appeal, that the Communist Party taught and advocated the overthrow of the Government of the United States during the membership of the appellants. 72 S. Ct. 516.

Advocacy of overthrow of the Government by force and violence is punishable activity. It is punishable because every government is said to have the power to protect itself against violent overthrow. Heretofore, before any person could be punished for so advocating, it had been necessary to establish the advocacy either by the individual or, at the very least, by the

organization. Under this statute that is no longer necessary.

As Mr. Justice Frankfurter remarked in his dissenting opinion in *Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525 at 546, speaking of the very section of this same statute here under review:

> "The Immigration authorities were by the Act relieved of proving—in order to make a prima facie case—that the Communist Party is an 'organization * * * that believes in, advises, advocates, or teaches * * * the overthrow by force or violence of the Government.'"

As a matter of fact, under the plain meaning of the statute and as it has been interpreted by the Immigration Service and by the court below in the case at bar, it is not a prima facie case only, but a complete case that is made by establishing membership in the Communist Party. Proof of that fact alone must, if the Act has a rational basis as was said above, be deemed proof also that the alien belonged to an organization which advocates the overthrow of the Government by force and violence.

This is a modification of the rule of evidence which was in effect prior to the passage of this statute.

This is not a procedural change as to which retroactivity is no reproach. This takes from the accused alien a fundamental defense—the defense that he did not and the organization to which he belonged did not in fact advocate the overthrow of the Government by force and violence. Under the rationale of the statute guilt consists not in membership in an organization

alone, but in membership in an organiaztion which advocates the overthrow of government by force and violence. By depriving the accused of an opportunity to demonstrate that his organization did not so advocate, he is deprived of an opportunity to contest the fact of guilt. The statute, therefore, permits guilt to be adjudged without evidence of guilt. As such it is an *ex post facto* law and void.

3. It is retrospective in operation.

The most essential element of an *ex post facto* law is, of course, that it be enacted after the fact which it seeks to punish. In the *Harisiades* case this Court has said that the statute there considered, making it a deportable offense to have been a member of an organization that advocated the overthrow of the government by force and violence at any time since entry, was not a new and isolated enactment, but a continuation of prior legislation. The Court said that since 1920 Congress had maintained a standing admonition to all aliens not to become members of such an organization. "There can be no contention," said the Court, "that they were not adequately forewarned, both that their conduct was prohibited and of its consequences." 72 S. Ct. at 520-521. Membership in the Communist Party, however, was never before proscribed by any act of Congress.

As late as 1939, when appellant in this case left the Communist Party, this Court had affirmed a decision of the Court of Appeals for the Fifth Circuit, which had held that the evidence introduced in a de-

portation case was insufficient to support finding that the Communist Party or the alien during the period of the alien's membership in 1933, taught, advocated, or incited the overthrow of the government by force and violence. It held that membership in the Communist Party in 1933 was not in 1939 a statutory ground for deportation. *Kessler v. Strecker,* 307 U.S. 22, 59 S. Ct. 694.

Following the decision in that case, the Congress passed the Alien Registration Act of 1940, 54 Stats. 670, 8 U.S.C. 137, amending the Act of 1920 to provide that any alien who had been at any time after entry a member of any of the excluded classes should be taken into custody and deported. *It was not until 1950, however, with the passage of the statute here attacked, that the Congress provided that membership in the Communist Party of the United States should be ground for deportation.*

When the Alien Registration Act of 1940 was passed, the Congress had before it the decision of this Court in *Kessler v. Strecker,* supra, and the statement of this Court therein:

> "* * * The District Court dismissed the writ. The respondent appealed to the Circuit Court of Appeals assigning error to the District Court's action in denying each of his contentions. That court found that the hearings had been fair, but held that each of the findings recited in the warrant was without support in the evidence. The court was of opinion the evidence failed to show that the respondent is now a member of the Communist Party *or that he or that party, in 1933, taught, advocated, or incited the overthrow of the Gov-*

> *ernment by force and violence,* and that the record was bare of evidence to countervail his denial that he had ever taught or believed in the unlawful destruction or overthrow of the Government by force. The court held that the Acts of 1918 and 1920 were passed to meet a situation caused by crises in Russia in 1918 and 1919; that the major changes in policy and conduct of the Soviet Socialist Republics which had taken place between 1918 and 1933 rebutted the implications *arising from membership in the Communist Party at the time the Acts were adopted;* that mere membership in that party in 1933 is not a statutory ground for deportation. 59 S. Ct. at 696. (Emphasis supplied.)

Congress also knew that in the *Kessler* decision this Court had considered the action of the Court of Appeals for the Fifth Circuit which had reversed the District Court "with directions to try the issues de novo as suggested in *Ex parte Fierstein* (CCA) 9 Cir., 41 F.2d 53 at p. 54."

Ex parte Fierstein, as Congress must have known, was a case in which the Court of Appeals for the Ninth Circuit refused to take judicial notice that the Communist Party was an organization that advocated the overthrow of the Government and reversed a District Court decision which had denied a writ of habeas corpus in a deportation case because the evidence introduced in the administrative hearing was insufficient to establish that the Communist Party so advocated. The Congress knew too that this Court held it error to hold a trial *de novo,* in which the finding of

the Secretary of Labor might be corrected or strengthened. *Kessler v. Strecker*, at p. 34.

Nothing could be clearer than that, had Congress intended in passing the Alien Registration Act of 1940 to make it the law of the United States that membership in the Communist Party of the United States at any time since entry was a ground for deportation, it had every opportunity to do so by express terms, and its failure to use such language made it abundantly evident that it had not intended to so provide.

The provision here under attack, therefore, which attempts to do what the Congress did not attempt in 1940, is clearly retrospective legislation. It is retrospective legislation which imposes punishment for an act which was not punishable at the time it was committed, for an act long past and done with, for an act which at the time it was committed could not have been regarded as prohibited by civil or criminal law, but was clearly an exercise of that right of association not yet denied the people in the United States. It must be condemned as an invalid *ex post facto* law.

C. THE STATUTE VIOLATES THE FIRST AND FIFTH AMENDMENTS.

This Court has in many decisions, beginning with *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S. Ct. 1016, and most recently in the *Carlson* and *Harisiades* cases, held that the power of Congress to de-

port undesirable aliens is a plenary power. It is said that the Congress can deport any class of aliens it deems undesirable. Reliance upon this plenary power has become the standing answer of the Government to all attacks upon its deportation activities. That power is not denied by the appellant here, nor attacked in this case. It is not denied and it is not attacked because it is not relevant to the issue before the Court.

The issue here is not whether Congress has the power to deport any alien it deems undesirable, but whether it has the power to enact bills of attainder and *ex post facto* laws, or any laws that contravene positive constitutional prohibitions.

The power to deport any alien deemed hurtful to the country is not the power to deport any alien by any mode which the Congress may deem desirable. It will surely be agreed that Congress could not deport aliens by having them bodily pushed into the Atlantic or Pacific Oceans and told to swim for the farther shore. Nor could it order them deported as punishment for conviction of a crime, if the conviction were obtained by summary procedure devoid of the elements of due process of law. *Wong Wing v. United States,* 163 U.S. 228, 16 S. Ct. 977; *Wong Yang Sung v. McGrath,* 339 U.S. 33, 70 S. Ct. 445. It cannot do such things because ours is a government of powers granted by the people—that is to say, its power is limited to that granted. When the Constitution says, "No Bill of Attainder or ex post facto Law shall

be passed," it means that although Congress may not be limited in the ends it may attain, it is limited as to the means it may use to any end.

Unless the words "No Bill of Attainder or ex post facto Law shall be passed" mean that Congress has no power to pass such bills, what can they mean? Can they mean that Congress has no power to pass such bills where they affect citizens, but may pass such bills where they affect aliens only?

If so, then the provisions of this constitutional prohibition differ from all others in their effect upon the power of the Congress. Neither Congress nor the states may take an alien's property without due process of law, nor deprive him of the equal protection of the laws (*Yick Wo v. Hopkins,* 118 U.S. 356, 6 S. Ct. 1064; *Truax v. Raich,* 239 U.S. 33, 36 S. Ct. 7); he may not be denied the writ of habeas corpus (*Nishimura Ekiu v. United States,* 142 U.S. 651, 12 S. Ct. 336); he may not be denied a trial by jury, because the Sixth Amendment says that "In *all* criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *"; nor may he be denied presentment or indictment by a grand jury, because the Fifth Amendment says, "*No person* shall be held to answer for a capital, or otherwise infamous crime, unless upon a presentment or indictment of a Grand Jury." (*Wong Wing v. United States,* supra.) He may not be denied bail in a criminal case (*Stack v. Boyle,* 324 U.S. 1, 72 S. Ct. 1).

Even in a deportation case, he may not be denied that fairness which is inherent in our guarantee of due process of law as contained in the Fifth Amendment (*Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S. Ct. 445).

It is frequently said in the cases that the power to deport is closely allied to the conduct of international affairs and is therefore entrusted to the political branches of the Government. *Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525. For this reason it is only with great hesitation that the courts sit in judgment upon congressional enactments dealing with deportation. Does the political aspect of the power to deport mean that constitutional prohibitions such as those discussed above may be disregarded by the Congress in passing deportation legislation? The argument that deportation statutes aimed at members of the Communist Party are political in nature and free from judicial scrutiny is based upon several related theories. It is said in *Carlson v. Landon*, supra, that alien communists are deportable like anarchists "because of Congress's understanding of their attitude toward the use of force and violence in such a constitutional democracy as ours to accomplish their political aims * * *" 72 S. Ct. at 535.

In the *Harisiades* case, supra, it was said that "Any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of gov-

ernment." 72 S. Ct. 519. It is further stated that such political decisions are not reviewable, as to their wisdom, by this Court.

Underlying both of these theories is the policy that Congress has complete power to protect the security of the United States. It is that power which enables it to strike at those who would use force and violence to achieve governmental change. The same power underlies our conduct of foreign relations, the war power, and the maintenance of a republican form of Government.

Such a power must extend as far as is necessary to achieve its purpose—the protection of our national security. In what way then can it be said to be limited to the control of alien Communists? It is not their alien character that is said to make such Communists dangerous, but their advocacy of the use of force to achieve change in the Government. If this much be granted, it must follow that the unreviewable political power of Congress to protect the security of the United States, if there is such a power, must extend to the control of citizens as well as alien Communists.

The theory that Congress has such an unlimited power, when placed beside constitutional limitations upon the power of Congress, raises the question whether in the view of the founding fathers the Constitution was designed to delineate governmental powers and their limitations for times of prosperity only, or for times of adversity also. If it is argued

that constitutional prohibitions which apply in normal times do not apply in times like these, then the view must be taken that the Constitution did not envisage times like these.

By the terms of the Constitution no bills of attainder or *ex post facto* laws may be passed, whether the times be good or ill. By the terms of the Constitution, all legislative enactments are subject to judicial review. The completeness of the constitutional prohibition is logically inconsistent with the view that the prohibitions and guarantees of the Bill of Rights and other sections of the Constitution were not designed to apply in cases where the protection of the national security was involved. More than 150 years of national existence without disregard of the limitations placed on Congressional power demonstrate that even in times of war and insurrection our governmental scheme has been sound.

If during the Civil War, when for four years the country was split in two and the two sections were at each other's throat with guns and knives, it was not necessary to find an unreviewable political power in Congress, how can the Court justify finding such a power today in times of peace? Yet it is now suggested that the Constitution allows Congress to avoid its fundamental limitations upon congressional power because it is dealing with the security of the Government.

No decisions of our courts have extended the idea that Congress has a nonreviewable political power as far as this. When the Legislature of Oklahoma sought to protect its internal security by requiring

a loyalty oath of its employees and officers, this Court held that it could not do so by an oath which offended due process. *Wieman v. Updegraff,* supra. The oath offended due process because it imposed a penalty (deprivation of government employment) upon state employees (whether alien or citizen) by the fact of membership in an organization alone, without requiring or permitting the affected individuals to establish their lack of knowledge of any subversive intent or purpose in any organization to which they may have belonged. In the concurring opinion of Mr. Justice Black such legislation is characterized not only as a bill of attainder imposing pains and penalties for past lawful associations and utterances, but as a violation of the First Amendment's guarantee of freedom of speech. With this Mr. Justice Frankfurter in his concurring opinion agrees. Not only does he agree, but he points to the fact that legislation which operates in this manner strikes at the very root of our democratic system by choking the source of public opinion.

The statute attacked in the case at bar operates in essentially the same way as does the Oklahoma statute condemned in the *Wieman* case. Membership alone imposes penalties although the membership at the time it occurred was lawful and although it may have ceased before any penalty is sought to be imposed. Under the rule of the *Wieman* case, therefore, the sections of the Subversive Activities Control Act here questioned violate the Fifth Amendment's guarantee of due process and the First Amendment's guarantee of freedom of speech.

D. THE DEPORTATION ORDER VIOLATES THE PRIVILEGE AGAINST SELF-INCRIMINATION OF THE FIFTH AMENDMENT.

The deportation order in this case is based solely upon the testimony of appellant given in a 1949 hearing, that he was a member of the Workers Party and later the Communist Party, its successor, from 1929 to 1939. All other evidence in the administrative record was either stricken or treated as stricken. (R. 12, 13.) The stricken evidence included testimony about the nature and aims of the Communist Party. (R. 12.) The manner in which that testimony became available for reliance upon by the Immigration Service is somewhat unusual.

Initial deportation hearings in the case were held in June 1949. (R. 9.) At that time appellant was charged with present membership in an organization which advocated overthrow of the Government by force and violence. During the course of the hearing he testified to his former membership in the Workers Party and the Communist Party and offered to prove that neither he nor the organization during his membership in it had advocated overthrow of the Government by force and violence.

Subsequent to the decision of this Court in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S. Ct. 445, those hearings were abandoned because they had not been conducted in conformity with the Administrative Procedure Act, 5 U.S.C. 1001, et seq. (R. 3.)

Thereafter in 1950 new hearings were convened. Appellant testified that he was not a member of the

Communist Party. He was then asked whether he had ever been a member of the Communist Party of the United States. This was objected to and petitioner refused to answer the question on advice of counsel. (R. 11.) Thereupon over objection that it was immaterial, the transcript of appellant's testimony from the 1949 hearing was admitted. The theory of the Hearing Examiner was that it was admissible as an admission against interest although the only charge pending was that of then present membership in the Communist Party. (R. 12.)

After this evidence had been admitted, a new charge was lodged that appellant had been since entry a member of the Communist Party of the United States. Consideration was limited to the lodged charge by the Hearing Officer. (R. 12.)

It is claimed by the appellant that the introduction of this evidence violated the guarantee against self-incrimination. Admittedly this claim is not based upon exact precedent. It is, however, based upon the following theory.

At the time the testimony was given in 1949 there was no reason to claim the privilege. There was then no provision allowing deportation for membership in the Communist Party, nor any statutory or common law crime which was evidenced by membership in the Communist Party.

When appellant testified about his Communist Party membership on June 13, 1949, it was not then clear that the Department of Justice held a theory

that membership in the Communist Party was evidence of subversive activity in violation of the Smith Act. At the earliest, this became known to the general public on August 30, 1949, when the Attorney General published a statement in *Look* magazine. See *Alexander v. United States*, 181 F. (2d) 480, 487 (9 Cir.). At the earliest, it was not until the decision of *Wertheimer v. United States*, 179 F. (2d) 559, 563 (10 Cir.), *Jan. 5*, 1950, that it was clear that a claim of the privilege against self-incrimination was good where the question concerned membership in the Communist Party.

Of course, the decision in *Wertheimer* was based upon prior decisions, but it is not for the Department of Justice now to maintain that that decision should have been foretold by appellant. The Department of Justice had another theory at the same time that it was prosecuting members of the Communist Party as violators of the Smith Act. The second theory was that used by Department of Justice special prosecutors in actions against Communists. It was that under *Schneiderman v. United States*, 320 U.S. 118, 63 S.Ct. 1333, the claim of privilege was not available when the question concerned membership in the Communist Party. See *Alexander v. United States*, supra, at 181 F. (2d) 480, Feb. 4, 1950.

When appellant refused to testify regarding his membership in the Communist Party, during the 1950 hearing, he objected to the introduction of the transcript of his former testimony. The evidence as offered at that time was immaterial because the charge

under which he was being tried was not membership in the Communist Party, but membership in an organization which advocated overthrow of the Government. Furthermore, the testimony was already matter of record and the claim of the privilege at that time, had it been allowed, would not have prevented an attempt to use that recorded testimony in a Smith Act prosecution. It could have been used either to found an inference that his prior membership had continued or as a lead to evidence of membership after 1939.

It was, therefore, not incumbent upon him to raise the claim of the privilege at the time the evidence was offered on June 13, 1950. (R. 10, 11, 12.) Nevertheless, he had not waived his privilege.

> "Since the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure, petitioner cannot invoke the privilege where the response to the specific question in issue here would not further incriminate her." *Rogers v. United States,* 340 U.S. 367, 372, 71 S. Ct. 438, 442.

Cf. *Arndstein v. McCarthy,* 254 U.S. 71, 41 S. Ct. 26, and *McCarthy v. Arndstein,* 262 U.S. 355, 43 S. Ct. 562.

In 1949 his testimony about membership served the function of qualifying him as a witness on the aims and purposes of the party. It was, therefore, given under compulsion, at least in the sense that had he not testified he might have been deported for

membership in an organization which advocated overthrow of the Government by force and violence. It was material to the issue before the tribunal at the time and it did not subject him to any penalties. Where there is no intention of waiving the privilege, there is no waiver. *Amos v. United States*, 255 U.S. 313, 41 S. Ct. 266.

One is ordinarily privileged to prevent one's own incrimination by testimony from one's own lips. Yet it was just such testimony which was introduced in the record over appellant's valid objection, which forms the sole support for the deportation order in the case at bar.

One is ordinarily reluctant to argue that evidence free of any internal flaws which establishes a point in issue may not be used, no matter under what circumstances it was obtained. If judicial or quasi-judicial tribunals are charged with determining matters of fact, then, it is argued, any evidence probative of the facts should be received. That policy, however, is overridden in our law by the greater value placed upon procedural regularity. (*Amos v. United States*, supra.) Illegally obtained evidence is not admissible in federal tribunals. Here the evidence was not obtained by an illegal search or seizure. It was obtained, however, by placing appellant in a position in 1949 hearings where his failure to testify might have subjected him to deportation, and where the claim of the privilege against self-incrimination was either not tenable or not called for. He was placed in this posi-

tion by the use of a procedure invalid under federal statute and under the Constitution. *Wong Yang Sung v. McGrath,* supra. By a subsequent change in the law the effect of his testimony was so modified that he should then, consistently with the theory of the privilege against self-incrimination, have been able to deny to the tribunal before which he appeared, his own testimony on the issue of membership in the Communist Party. He attempted to deny it to the tribunal, but the testimony was used nevertheless. There is no real distinction between this use of his prior recorded testimony and the use of testimony forced from him at the 1950 hearing by threats or torture.

The testimony thus obtained is the sole support of the deportation order. Regardless of the decision of this Court on all other issues in the case, the deportation order must be invalidated for its repugnance to the guarantees against self-incrimination contained in the Fifth Amendment.

E. THE JUDGMENT OF THE COURT BELOW DEPRIVED APPELLANT OF DUE PROCESS OF LAW.

The Court below dismissed the complaint without opinion. By its dismissal it ruled that appellant was not entitled under the circumstances of this case to a declaratory judgment on the constitutionality of the statute attacked, on the claim of illegal self-incrimination, or on the claim that the hearing officer was

not impartial as required by the Administrative Procedure Act. This was reversible error. *McGrath v. Kristensen,* 340 U.S. 162, 71 S.Ct. 224.

By its decision the District Court denied appellant a review of administrative action under the provisions of Section 10 of the Administrative Procedure Act, 5 U.S.C.A. 1009. While the question of the availability of such review has not been authoritatively determined by this Court (see *McGrath v. Kristensen,* supra), it has been passed upon by the Second Circuit in *United States ex rel. Trindler v. Carusi,* 166 F. (2d) 457 (3 Cir.). By the plain meaning of the Administrative Procedure Act such review must be deemed available.

By its decision granting the Government's motion to dismiss, the District Court held that as a matter of law one may be deported although he never advocated the overthrow of the Government by force and violence, nor belonged to any organization that so advocated; although he was ordered deported by a hearing officer who was not impartial; although the order for his deportation was supported solely by his own testimony in violation of the privilege against self-incrimination. These were the allegations of his complaint. They must be taken as true for the purposes of deciding a motion to dismiss. To deny plaintiff a trial on the merits and to deny him even the power to require the Government to meet his allegations by an answer, is a denial of justice and of due process of law. *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 71 S. Ct. 624 (1951).

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

Dated, San Francisco, California,
January 12, 1953.

ALLAN BROTSKY,
Counsel for Appellant.

GLADSTEIN, ANDERSEN & LEONARD,
LLOYD E. MCMURRAY,
Of Counsel.

(Appendices "A" and "B" Follow.)

Appendices "A" and "B"

Appendix "A"

In the United States District Court for the Northern District of California, Southern Division

No. 31,671

William Heikkila,
Plaintiff,

vs.

Bruce G. Barber, Individually and as District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District; John Doe One, through John Doe Ten, inclusive,
Defendants.

JUDGMENT

William Heikkila, plaintiff herein, having applied to a judge of this Court for an interlocutory injunction restraining the enforcement, operation and execution of an Act of Congress for repugnance to the Constitution of the United States, and Bruce G. Barber, defendant herein, having moved to dismiss this action, and said application and motion having been heard by this court of three judges under section 2284 of Title 28 of the United States Code, and this court

aving concluded that said motion should be granted, is hereby ordered, adjudged and decreed that said motion be, and it is, hereby granted, that this action e, and it is, hereby dismissed, and that said defendnt Barber recover his costs.

Dated August 4, 1952.

/s/ CLIFTON MATHEWS,
United States Circuit Judge;

/s/ LOUIS E. GOODMAN,
United States District Judge;

/s/ OLIVER J. CARTER,
United States District Judge.

Appendix "B"

EXCERPTS FROM SEC. 22 OF THE SUBVERSIVE ACTIVITIES CONTROL ACT OF 1950, AS CODIFIED: TITLE 50, USC.

Sec. 783. Offenses—

(a) Conspiracy or attempt to establish totalitarian dictatorship. It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

* * * * * *

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

Sec. 786. Registration and annual reports of Communist organizations—

(a) Communist-action organizations. Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

Sec. 791. Subversive Activities Control Board—

(a) Creation; membership; designation of Chairman; removal. There is established a board, to be known as the Subversive Activities Control Board, which shall be composed of five members, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three members of the Board shall be members of the same political party. Two of the original members shall be appointed for a term of one year, two for a term of two years, and one for a term of three years, but their successors shall be appointed for terms of three

years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

* * * * * * *

(e) It shall be the duty of the Board—

(1) upon application made by the Attorney General under section 792(a) of this title, or by any organization under section 792(b) of this title, to determine whether any organization is a "Communist-action organization" within the meaning of paragraph (3) of section 782 of this title, or a "Communist-front organization" within the meaning of paragraph (4) of section 782 of this title; and

(2) upon application made by the Attorney General under section 792(a) of this title, or by any individual under section 792(b) of this title, to determine whether any individual is a member of any Communist-action organization registered, or by final order of the Board required to be registered, under section 786(a) of this title.

* * * * * * *

Sec. 792. Proceedings before Board—

(a) Petition by Attorney General for registration; verification; contents. Whenever the Attorney General shall have reason to believe that any organi-

zation which has not registered under subsection (a) or subsection (b) of section 786 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 787 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

* * * * * * *

(c) Upon the filing of any petition pursuant to subsection (a) or subsection (b) of this section, the Board (or any member thereof or any examiner designated thereby) may hold hearings, administer oaths and affirmations, may examine witnesses and receive evidence at any place in the United States, and may require by subpena the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed relevant, to the matter under inquiry. Subpenas may be signed and issued by any member of the Board or any duly authorized examiner. Subpenas shall be issued on behalf of the organization or the individual who is a party to the proceeding upon request and upon a statement or showing of general relevance and reasonable scope of the evidence sought. Such attendance of witnesses and production of such docu-

mentary evidence may be required from any place in the United States at any designated place of hearing. Witnesses summoned shall be paid the same fees and mileage paid witnesses in the district courts of the United States. In case of disobedience to a subpena, the Board may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any person, issue an order requiring such person to appear (and to produce documentary evidence if so ordered) and give evidence relating to the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. No person shall be held liable in any action in any court, State or Federal, for any damages resulting from (1) his production of any documentary evidence in any proceeding before the Board if he is required, by a subpena issued under this subsection, to produce the evidence; or (2) any statement under oath he makes in answer to a question he is asked while testifying before the Board in response to a subpena issued under this subsection, if the statement is pertinent to the question.

(d) (1) All hearings conducted under this section shall be public. Each party to such proceeding shall

have the right to present its case with the assistance of counsel, to offer oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. An accurate stenographic record shall be taken of the testimony of each witness, and a transcript of such testimony shall be filed in the office of the Board.

(2) Where an organization or individual declines or fails to appear at a hearing accorded to such organization or individual by the Board pursuant to this section, the Board may, without further proceedings and without the introduction of any evidence, enter an order requiring such organization or individual to register or denying the application of such organization or individual, as the case may be. Where in the course of any hearing before the Board or any examiner thereof a party or counsel is guilty of misbehavior which obstructs the hearing, such party or counsel may be excluded from further participation in the hearing.

"(e) In determining whether any organization is a "Communist-action organization", the Board shall take into consideration—

(1) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world

Communist movement referred to in section 781 of this title; and

(2) the extent to which its views and policies do not deviate from those of such foreign government or foreign organization; and

(3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization; and

(4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and

(5) the extent to which it reports to such foreign government or foreign organization or to its representatives; and

(6) the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives; and

(7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein;

(iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis; and

(8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization.

(f) In determining whether any organization is a "Communist-front organization", the Board shall take into consideration—

(1) the extent to which persons who are active in its management, direction, or supervision, whether or not holding office therein, are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 781 of this title; and

(2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 781 of this title; and

(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 781 of this title; and

(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 781 of this title.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 786 of this title; or

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 786(a) of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 787 of this title.

(h) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney Gen-

eral an order denying his petition for an order requiring such organization to register as such under section 786 of this title; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such individual to register as such member under section 787 of this title; and send a copy of such order to such individual.

(i) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual reports; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is not an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon

the Attorney General an order requiring him to (A) strike the name of such individual from the registration statement or annual report upon which it appears or (B) cancel the registration of such individual under section 787 of this title, as may be appropriate; and send a copy of such order to such individual.

(j) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order denying its petition for the cancellation of its registration and for relief from the requirement of further annual reports; or

(2) that an individual is a member of a Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order denying his petition for an order requiring the Attorney General (A) to strike his name from any registration statement or annual report on which it appears or (B) to cancel the registration of such individual under section 787 as the case may be. . .

(k) When any order of the Board requiring registration of a Communist organization becomes final under the provisions of section 793(b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all members of such organization that such order has become final.

Sec. 793. Judicial review—

(a) Courts of Appeals; petition; place; record; transfer; conclusiveness of Board's findings; additional evidence; modification by Board; judgment; finality. The party aggrieved by any order entered by the Board under subsection (g), (h), (i) or (j) of section 792 of this title may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and file in the court a transcript of the entire record in the proceeding, including all evidence taken and the report and order of the Board. Thereupon the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board; but the court may in its discretion and upon its own motion transfer any action so comenced to the United States Court of Appeals for the circuit wherein the petitioner resides. The findings of the Board as to the facts, if supported

by the preponderance of the evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence, shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration. If the court shall set aside an order issued under subsection (j) of section 792 of this title it may, in the case of an organization, enter a judgment canceling the registration of such organization and relieving it from the requirement of further annual reports, or in the case of an individual, enter a judgment requiring the Attorney General (A) to strike the name of such individual from the registration statement or annual report on which it appears, or (B) cancel the registration of such individual under section 787 of this title, as may be appropriate. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 426

WILLIAM HEIKKILA, *Appellant*,

v.

BRUCE G. BARBER, etc., et al.

Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR APPELLANT

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8 U.S.C. 1252(d) .....
Internal Security Act of 1950, sec. 22(1)(D), (E
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19 Car. II, c. 10 .....
9 Geo. I, c. 17 .....

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H. Doc. 679, 81st Cong., 2d Sess. .....
H. Doc. 708, 81st Cong., 2d Sess. .....
Sen. Rep. 2230, 81st Cong., 2d Sess. .....
Sen. Rep. 2369, 81st Cong., 2d Sess. .....
Sen. Rep. 2031, 76th Cong., 3d Sess. .....
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 426

WILLIAM HEIKKILA, *Appellant*,

v.

BRUCE G. BARBER, etc., et al.

Appeal from the United States District Court for the Northern District of California

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REPLY BRIEF FOR APPELLANT

I. INJUNCTION IS AN APPROPRIATE REMEDY IN THIS CASE

The government's argument in *Martinez* v. *Neelly*, No. 218, this Term, that deportation orders are reviewable only in habeas corpus and not by injunction, has no application to this case. That argument admittedly rests entirely on the presence in the Immigration Act of the provision that in deportation cases "the decision of the Attorney General shall be final" (Respondent's Brief in *Martinez*, p. 18). Where this provision is inapplicable, no serious question

can be raised as to the availability of injunctive rev
Such is the situation here.

The finality provision was designed to confine judi
review of the Attorney General's determinations of f
Estep v. *United States*, 327 U. S. 114, 122, footnote 14.
provision comes into play, therefore, when the litiga
attacks the deportation order on such grounds as the
sufficiency of the evidence to support the order. In f
the insufficiency of the evidence was the only ground s
ously pressed by the petitioner in *Martinez*.

The finality provision has no possible bearing, howe
when, as here, the suit attacks not the Attorney Gener
finding under the statute, but the validity of the stat
itself. The provision was designed to insulate, to s
extent, the Attorney General's determination from c
review. It was not intended to insulate the statute f
court review of its constitutionality. The deportation
der here is mandatory once the Attorney General finds
the alien is or was a member of the Communist Party.
finding on that issue is protected by the finality provis
but the statutory provision itself is not.

That a distinction must be made between review of
validity of the underlying statute and review of the adm
istrative decision under the statute also appears from
decisions which permit judicial review of the former is
even when the statute altogether precludes judicial rev
of the latter. *Ludecke* v. *Watkins*, 335 U. S. 160, and se
165, footnote 8; *Yakus* v. *United States*, 321 U. S. 414. Th
cases demonstrate that a limitation on review of the adm
istrative determination does not affect review of the va
ity of the statute. Moreover, the Court has gone a-s
further by permitting injunctive review of the adminis
tive determination in deportation cases of the jurisdictio
fact of alienage. *Perkins* v. *Elg*, 307 U. S. 325; *McGrat*
Kristensen, 340 U. S. 162, and see *Kristensen* v. *McGr*
179 F. 2d 796.

Since the finality provision has no bearing on the is
raised in this case, injunctive review is available under

District Court's general equity jurisdiction (*Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 690-691, 712), uncomplicated by the inapplicable finality provision.

If the distinction we suggest is not controlling, we urge, nevertheless, that injunctive review of deportation orders is permitted by section 10 of the Administrative Procedure Act. On this point, we rely upon, without repeating, the argument and analysis in the Petitioner's Reply Brief in *Martinez*.

However, we make the additional observation that the soundness is questionable of those cases which held, prior to enactment of the Administrative Procedure Act, that the finality provision made habeas corpus the exclusive remedy to review deportation orders. The finality provision governs the intensity and scope of judicial review of the administrative decision, but it does not follow that as a result it also governs the form of the remedy. The respect which the finality provision exacts for the administrative determination can be accorded in an injunction suit as readily as in a habeas corpus proceeding.

As a practical matter, to limit the review to habeas corpus would cause a hardship to the alien and his family which admittedly "is of no corresponding advantage to the government." (Brief for Respondent in *Martinez*, p. 44). Indeed, if injunctive review is eliminated, there is also thereby eliminated any possibility of attaining the advantages which the government sees in having the Attorney General or Commissioner of Immigration made parties to the litigation. An injunction suit can be brought in the District of Columbia against these officials; habeas corpus can involve only their subordinate. Thus if the injunction remedy is eliminated, the alien cannot obtain a complete remedy even if he desires one, since theoretically he could, after release on habeas corpus, be rearrested in another District by another subordinate official. Nor can he in habeas corpus join as parties the officials who issued the order he attacks.

In many cases, furthermore, habeas corpus is not an adequate remedy. Years may elapse between the time an alien is ordered deported and the time he is actually taken into custody for deportation, as when problems arise in finding a country which will receive him. Yet for all the alien knows, he may be taken into custody for deportation at any moment. If he cannot challenge the deportation order in this interval, he is left in a hopelessly unsettled situation with respect to arranging his business and family affairs. Moreover, he is subject to the indignities and inconvenience of supervision and reporting requirements (8 U.S.C. 1252(d)), even though the deportation order could be proven invalid, if he only had the opportunity to challenge it.

II. THE ATTORNEY GENERAL OR THE COMMISSIONER OF IMMIGRATION IS NOT AN INDISPENSABLE PARTY.

On this point the government relies on its brief in *Martinez*. We think the government's argument is adequately answered by, and we therefore rely on, the Reply Brief for Petitioner in *Martinez*. In this case as in *Martinez*, the appellant can be granted the relief he seeks without a decree requiring affirmative action by the Attorney General or the Commissioner of Immigration. The unnecessary inconvenience of a rule which would require plaintiffs to bring their suits in the District of Columbia is well illustrated by this case, which involves a resident of California.

III. THE STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

A. The Nature of the Statute.

The government urges two grounds in support of the validity of the statute: (1) that it does not inflict punishment, and therefore is not a bill of attainder or an ex post facto law; (2) that it represents a reasonable determination by Congress, based on adequate evidence, that the Communist Party is and was an organization which advo-

cates the violent overthrow of the government; therefore, it is argued, the provision is equivalent to the deportation provision sustained in *Harisiades* v. *Shaughnessy*, 342 U.S. 580. An analysis of the statute is, we believe, important to the consideration of these two arguments.

The provision here challenged is the only deportation provision which provides for the expulsion of members and affiliates of a specified, named organization. Other deportation provisions relate to aliens described in terms of their own culpable qualities or the culpable qualities of organizations with which they are or were affiliated.

This provision proscribing the Communist Party by name did not replace the expulsion provisions which had been previously employed against alien members of the Communist Party. The Internal Security Act kept, and the new Immigration and Naturalization Act still keeps, the provision, upheld in *Harisiades*, expelling past and present alien members of any organization which advocates the violent overthrow of the government. There also remains the provision expelling aliens who themselves advocate such doctrine.

In addition, the Internal Security Act added still more expulsion grounds aimed at members of the Communist Party. Thus it provided in sections 22 (1) (D) and (E), and 22(4) (a) for the deportation of (1) aliens who advocate the doctrines of world communism or who ever were affiliated with any organization which advocates such doctrines; and (2) alien affiliates of any organization required to register under the Act (after an administrative hearing before the Subversive Activities Control Board) as "Communist organizations."

Only one legislative explanation has been given as to why Congress thought it desirable to proscribe the Communist Party by name despite the availability of the other mentioned deportation provisions. This explanation, appearing in a report of the Senate Judiciary Committee on the antecedent bill which originated the provision, is

quoted in the government's brief beginning at the foot of page 25. Briefly, it states that the provision was considered desirable because of the difficulty of proving that the Communist Party advocates violent revolution. The government's brief turns this explanation upside down; it insists that Congress thought that it was so easy to prove that the Communist Party is subversive, that it decided to dispense with the wasteful formality of proof.

In any event, there are certain incongruities in the view that the provision represents a Congressional determination that the Communist Party advocates violent revolution. In the first place, the provision applies not only to the Community Party as it was at or before the time of the legislation, but also to the Communist Party of the future and expressly to any successor organization. Obviously, it was impossible for Congress to make a factual finding that an organization engaged in the future in advocacy of violence.

Secondly, the provision proscribes not only the Communist Party of the United States, but also by name the Communist Political Association. Yet the theory of the government in its various prosecutions of Communists under the Smith Act is that the Communist Political Association advocated peaceable change and class collaboration, and that the conspiracy of violent revolution which the government attributes to Communists under the Smith Act, had its inception with the dissolution of the Communist Political Association and the reconstitution of the Communist Party.[1]

Thirdly, the provision does not exempt membership in the Communist Party during the time the United States was engaged in World War II. Yet it is indisputable that during World War II, the Communist Party, so far from

[1] This was the government's theory in the two Smith Act cases which have recently been before this Court. *Dennis* v. *United States*, 341 U.S. 494; *Frankfeld* v. *United States*, No. 204 Misc., this Term, cert. denied, Jan. 19, 1953.

advocating the violent overthrow of the United States government, supported the government in its defense against the aggression of the axis powers.

The provision was not necessary to serve the purpose of expelling aliens who are undesirable because of past or present contact with doctrines of violence. The already-existing deportation provisions were fully adequate for this purpose, and the executive's experience in administering them had so shown. On August 8, 1950, about a month before enactment of the Internal Security Act, the President sent to Congress a message recommending the enactment of new legislation to protect the internal security. He expressly stated therein that the existing immigration laws "permit the Government to exclude or deport any alien from this country who may be dangerous to our internal security". H. Doc. 679, 81st Cong., 2d Sess., p. 4; 96 Cong Rec. 12019. The President requested in his message that the immigration laws be amended to include reporting requirements for aliens ordered expelled but not yet deported (H. Doc. 679, p. 5; 96 Cong. Rec. 12020), but he saw no necessity for requesting an increase in the classes of deportable aliens. Later, in his message vetoing the Internal Security Bill, the President criticized the bill's new exclusion provisions as serving no useful purpose and even as being harmful to the internal security. H. Doc. 708, 81st Cong., 2nd Sess., pp. 8-9; 96 Cong. Rec. 15629.

The provision is irrelevant to determining which aliens are undesirable, because it allows no accommodation for the nature, time or duration of the particular alien's affiliation with the organization. It is immaterial that the alien's association and activities in the Communist Party may have been altogether innocent or passive; that his membership may have been for the most fleeting period of time; that it may have been as remote as 1919, when the Communist Party was formed; or that the alien had long abandoned, if he ever had, Communist beliefs.

For all these reasons, and in its context, the provision here involved cannot be taken to represent a rational determination of the undesirability for residence of certain aliens based on their affiliation with an organization which advocated violent revolution. It represents instead a Congressional decision to punish aliens for membership in the Communist Party, regardless of the present, past, or future nature of the Party. The Senate Judiciary Committee said as much in the report to which we have already referred. It stated: "This provision is new and is designed as a direct identification and proscription of such aliens as subversive." (Sen. Rep. 2230, 81st Cong., 2d Sess., p. 6, repeated in S. Rep. 2369, 81st Cong., 2d Sess., p. 6, accompanying S. 4037, the immediate antecedent of the Internal Security Act). From the tenor of the report, one may be sure that Senator McCarran and the Judiciary Committee as a whole would have been glad, absent doubts as to constitutionality, to recommend legislation enacting outright criminal penalties for affiliation with the Communist Party. The committee recommended the deportation sanction instead only because as to that it did not have such doubts.

B. The Statute Is a Bill of Attainder.

1. *Some Deportation Provisions Can Inflict Punishment*

The only question as to whether this legislation is a bill of attainder is whether it inflicts punishment. The government, relying on *Harisiades*, insists that it does not. The holding in *Harisiades* was that a provision expelling aliens who had been members of an organization advocating the violent overthrow of the government did not inflict punishment and was therefore not ex post facto legislation. It does not necessarily follow, of course, that because the deportation provision involved in *Harisiades* does not inflict punishment, no other deportation provision does or can. The government, however, draws this conclusion from *Har-*

isiades, and in fact that is what *Harisiades* says, although it does not so hold.

We submit that the generalization in *Harisiades* that "deportation is not punishment" is unsound in principle and on precedent. It is not permissible to inquire, in the abstract and conceptualistically, whether expulsion is punishment. The question is whether the particular expulsion provision inflicts punishment, and this can be resolved by applying criteria which have, except in *Harisiades*, been consistently employed by this Court. The application of such criteria will demonstrate that the particular expulsion provision involved in this case does inflict punishment, even if the one involved in *Harisiades* did not.[2] The approach we urge was stated in *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, 722:

> "Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation'."

Harisiades recognized that punishment can be inflicted by the imposition of civil disabilities. And indeed a variety of legislative acts have been held to inflict punishment, including acts which permitted the seizure of property (*Fletcher* v. *Peck*, 6 *Cranch* 87), excluded certain persons from various professions or employment (*Cummings* v. *Missouri*, 4 Wall. 277; *Ex Parte Garland*, 4 Wall. 333; *United States* v. *Lovett*, 328 U.S. 303; *cf. Garner* v. *Board of Public Works of Los Angeles*, *supra*), denied access to the courts (*Pierce* v. *Carskadon*, 16 Wall. 234), or exacted a tax (*Burgess* v. *Salmon*, 97 U.S. 381).

Of course, these decisions do not mean that all acts seizing property, excluding persons from professions or employment, denying access to the courts, or exacting taxes,

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[2] It is important to observe that we are here concerned with expulsion of a resident alien, not exclusion of an entering alien. The latter is not protected by the Constitution.

are punishment.' The Court did not find it necessary 't overrule or limit *Cummings* v. *Missouri* in holding tha certain statutes which denied access to the professions wer not punishment. *Hawker* v. *New York*, 170 U.S. 189; *Dei* v. *West Virginia*, 129 U.S. 114.

The meaning of the decisions is that deprivation of *an* privilege may or may not amount to punishment, and tha whether it does or not depends on the nature of the depriv ing legislation and not on the quality of the privilege. S when legislation deprives an alien of the privilege of con tinued residence in the country, the question of punishmen vel non depends on the nature of the expulsion legislation For this reason, the holding in *Harisiades* that a particula statutory deprivation of the residence privilege was no punishment, does not resolve the issue as to whether anoth er statutory deprivation of the residence privilege is pun ishment.

The fact is that if the test of punishment was the charac ter of the privilege rather than the nature of the depriva tion, it would indeed be anomalous to hold that deportation cannot be punishment. For the residence privilege is cer tainly more important to the individual than the ability to practice a particular profession in a particular state One who loses the residence privilege is deprived of liberty almost as much as one who is imprisoned.

The *Harisiades* opinion gives no explanation as to why deportation is not punishment although imposition of lesser civil disabilities can be punishment. It simply relies on the expression of the same generalization in *Mahler* v. *Eby*, 264 U. S. 32, and *Bugajewitz* v. *Adams*, 228 U.S. 585. The deportation provisions involved in the *Mahler* and *Buga jewitz* cases were, under the standards we later describe correctly considered not to be punishment. But the opin ions' verbalizations as to deportation generally went be yond the holdings, were not a correct statement, and should not have been adopted by *Harisiades*.

Mr. Justice Jackson, who wrote the opinion of the Court in *Harisiades*, has recognized the logical difficulties of a generalized rule that deportation is not punishment. In his dissenting opinion in *United States* v. *Spector*, 343 U.S. 169, 178, he stated:

> "Administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations. That doctrine, early adopted against sharp dissent, had been adhered to with increasing logical difficulty as new causes for deportation, based not on illegal entry but on conduct after admittance, have been added, and the period within which deportation proceedings may be instituted has been extended. By this Act a deportation order is made to carry potential criminal consequences."

The generality in *Harisiades* involves not only logical difficulties, but perpetrates an anachronism when applied to oust application of the bill of attainder clause. One of the familiar penalties imposed by Parliamentary bills of pains and penalties was banishment from the realm. So Parliament decreed the banishment of the Earl of Clarendon in 1667 (19 Car. II, c. 10) and of the Bishop of Rochester in 1722 (9 Geo. I, c. 17; see 46 Col. L. Rev. 849-851). Indeed, the first known instance of the use of the bill of pains and penalties was the banishment of the two Spensers in 1322 (46 Col. L. Rev. at 859, ftnote 7). And the last attempted Parliamentary bill of pains and penalties also contemplated a civil sanction—the removal of Queen Caroline's rights as Queen Consort and the dissolution of her marriage to George IV (*id.* at 851).

Under our analysis, a holding favorable to appellant will not imply that deportation cases must be tried by jury like criminal cases. For we think it is plain that legitimate deportation provisions do not impose punishment of any kind, although the one here involved does. We come next to the

question of what is the test for determining which deportation provisions are punitive.

2. *A Deportation Provision Inflicts Punishment Unless It Establishes Reasonable Standards of Undesirability for Residence.*

Dent v. *West Virginia*, *supra*, held that a legislature could exclude a physician from his profession by raising the educational requirements for medical practitioners. *Hawker* v. *New York*, *supra*, held that a legislature could exclude from the practice of medicine physicians who had theretofore been convicted of felonies. In both cases, the Court held that the statutes did not inflict punishment, but instead merely established qualifications for the medical profession which were reasonably related to the proper practice of the profession. The Court distinguished *Cummings* v. *Missouri* and *Ex Parte Garland* on the ground that the test oaths in those cases exacted requirements which had no reasonable relation to the proper practice of the professions involved.

In *Dent* v. *West Virginia*, the Court explained *Cummings* and *Garland* as follows (at 126):

> "As many of the acts from which the parties were obliged to purge themselves by the oath had no relation to their fitness for the pursuits and professions designated, the court held that the oath was not required as a means of ascertaining whether the parties were qualified for those pursuits and professions, but was exacted because it was thought that the acts deserved punishment, and that there was no way of inflicting punishment except by depriving the parties of their offices and trusts."

The Court also remarked (at 128) that the oath in *Cummings* v. *Missouri* was "the exaction of an oath as to their past conduct, respecting matters which have no connection with such professions," as contrasted to the law being examined which "was intended to secure . . . skill and learning in the profession of medicine."

In the *Hawker* case, the Court made the same analysis. It stated (at 198) of *Cummings* and *Garland*:

> "It was held that, as many of the matters provided for in these oaths had no relation to the fitness or qualification of the two parties, the one to follow the profession of a minister of the gospel and the other to act as an attorney and counselor, the oaths should be considered, not legitimate tests of qualifications, but in the nature of penalties for past offenses."

The Court had no trouble in deciding that this situation did not apply to legislation which resulted in barring from practice a physician who had been convicted of committing an abortion prior to the enactment of the legislation. Such a statute, the Court stated (at 199) was not an imposition of an additional penalty, but the prescribing of reasonable qualifications for those practicing the profession.

This same distinction was made in *Garner* v. *Board of Public Works of Los Angeles, supra*, at 722-724, in which the Court differentiated between a punitive exclusion from state employment and legislative definition of the standards of qualification for employment.

The distinction made by these cases between punishment and the establishment of standards of qualification is that in the latter situation the standards bear a reasonable relationship to insuring that the privilege is not misused. This test is readily applied to situations involving the privilege of aliens to continue to reside in the United States. A deprivation of the residence privilege is not punishment if it represents the establishment of standards reasonably relevant to ridding the country of undesirable aliens. But it is punishment to deprive a resident alien of his residence privilege if the deprivation is not based on any standards at all or on standards which have no reasonable relationship to undesirability.

This is precisely the test which the Court had in mind in a decision which is relied on by *Harisiades* to support the proposition that deportation is not punishment. *Mahler* v. *Eby, supra*, held that it was not punishment to expel an alien who, before enactment of the particular deportation statute, had been convicted of a felony against the security of the state. Obviously, such an expulsion statute was an

establishment of reasonable qualifications for the privil
within the doctrine of *Hawker* v. *New York*, and in f
the Court in *Mahler* relied on *Hawker*. The Court stated
Mahler (at 39) that by the statute Congress

> "was, in the exercise of its unquestioned right, o
> seeking to rid the country of persons who had sho
> by their career that their continued presence h
> would not make for the safety or welfare of society

Surely this decision cannot be taken to mean that the Co
would have sustained as not being punishment an expuls
statute which had no rational relationship to alien un
sirability. Such a statute would not be an exercise of C
gress' "unquestioned right" to get rid of aliens who h
demonstrated their undesirability. Similarly, the dict
in *Bugajewitz*, also relied on by *Harisiades*, must be und
stood in the light of the expulsion statute there involv
That statute required the expulsion of alien prostitu
and thus was an exercise of the right to expel undesira
aliens.

*3. The Deportation Provision Here Involved Inflicts P
ishment Because It Does Not Establish Standards
Undesirability and Has No Reasonable Relevance
Expulsion of Undesirable Aliens.*

Under the tests which we have described, the statute h
involved is clearly punishment. For the statute establis
no standards at all of alien undesirability, a process wh
would necessarily involve a statement of culpable char
teristics. All the statute does is to expel members o
named organization. This is not a definition of standa
or qualifications or even a statement of cause for expulsi
It is merely an identification of the persons to be expel
The situation is precisely as if Congress had listed cert
aliens by name and provided that they should be deport
The situation is the same as the statute in the *Lovett* ca
which, the Court later explained, was penal because it "
not declare general and prospectively operative standa
of qualification and eligibility for public employmen

Garner v. *Board of Public Works of Los Angeles*, *supra*, at 723.

Moreover, the analysis and history of the statute which we presented at the opening of this section demonstrates, we insist, that the statute has no rational relevance to a policy of expelling undesirable aliens. On this very record the statute is being employed to expel an alien who never was a member of an organization which advocated violence and who never himself so advocated. The statute is simply a vindictive product of anti-Communist hysteria.

This deportation provision is, therefore, punishment, and thus a bill of attainder. It would be a vast extension of *Harisiades* to make that decision applicable to this statute. *Harisiades* is, we respectfully submit, questionable on principle and unfortunate in result. *Harisiades* should be reconsidered, but whether or not it is reconsidered, its doctrine should not be extended to apply to this statute.

C. The Statute Is an Ex Post Facto Law.

Since the statute inflicts punishment, it is also invalid as an ex post facto law in its application to appellant. Appellant is being punished under the statute for conduct in which he engaged before the enactment of the legislation.

There is not present here the complication in *Harisiades*, which pointed out that since 1920 Congress had maintained a standing admonition to aliens not to join organizations that advocate violent revolution. Not until 1950, by this statute, did Congress admonish aliens not to join the Communist Party, and Congress did not earlier make a legislative finding that the Communist Party advocated violence. The government's argument that certain courts and the Immigration Service made such a finding in the past is immaterial, for the only appropriate inquiry with regard to the ex post facto clause is what Congress did,—not what the other branches found. Moreover, before and after 1939, the courts certainly questioned whether the Communist Party advocated violence (see our principal brief, pp. 48-51). *Schneiderman* v. *United States*, 320 U.S. 118, was decided in 1943, and it held that it was a tenable position

that the Communist Party did not advocate the violent overthrow of the government. The government itself conceded in *Schneiderman* that there could be conflicting views on the subject.

D. The Statute, on Its Face and as Applied, Violates the First Amendment.

In *Harisiades*, the Court held that the First Amendment did not protect an alien against expulsion for past membership in an organization which advocated the violent overthrow of the government. The Court based this holding on the nature of the advocacy involved, and asserted Congress' right to distinguish between the advocacy of peaceable change and the teaching of violence.

The statute here makes no such distinction. It simply proscribes for an alien an identified political affiliation, whether or not the group advocated violence. Furthermore, the statute was applied here to membership in an organization alleged in the complaint not to advocate violence (R. 5), and to prevent appellant from proving that the group did not so advocate. Under *Harisiades*, therefore, the statute violates the First Amendment on its face and as applied.

Harisiades permitted an extreme interference with aliens' rights of speech and association, since it sustained deportation not for anything the alien himself said or did, but because of the guilty advocacy of the organization. In this respect, *Harisiades* seems inconsistent with *DeJonge* v. *Oregon*, 299 U.S. 353, and *Wieman* v. *Updegraff*, No. 14, this Term. The statute here is an even greater invasion of the First Amendment area than the provision sustained in *Harisiades* and it can not be justified under that decision.

E. The Statute, on Its Face and as Applied, Violates the Fifth Amendment.

It is settled that the alien expulsion process (though not alien exclusion) must supply procedural due process. *Japanese Immigrant Case*, 189 U.S. 86; *United States ex rel Vajtauer* v. *Commissioner*, 273 U.S. 103, 106; *United States*

ex rel Tisi v. *Tod*, 264 U.S. 131, 134; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. Since there is only one due process clause, it follows that the expulsion process must also supply substantive due process. Moreover, it would be irrational to hold that the one power of Congress exempt from the Fifth Amendment is the deportation power. Even the war power is limited by the Fifth Amendment, and, of course, resident aliens are entitled to substantive due process.

The deportation of appellant exiles him and thus deprives him of his liberty and, in a realistic sense, of his property. On this record, the appellant is being subjected to this deprivation solely because of his past innocent membership in an innocent organization. Furthermore, the statute, as our preceding analysis shows, is not designed to serve any rational policy of ridding the country of undesirable aliens. *Harisiades*, at least, sustained expulsion for past membership in an organization described as having a guilty purpose. But the expulsion here is for membership in an organization which is described only by name, which on this record was an innocent organization, and to whose guilt or innocence the statute is indifferent.

The statute here, therefore, has all the features which made questionable the provisions upheld in *Harisiades*, for it rests on pre-statutory and remote conduct and on the "guilt" of organizational membership rather than on personal guilt. But in addition, the provision and its application have objectionable characteristics which go far beyond those present in the legislation sustained by *Harisiades*.

The government argues that Congress had sufficient evidence to enable it reasonably to conclude that the Communist Party is and was an organization which advocates violent revolution. But it is never reasonable to punish an individual on a finding of guilt which he is given no opportunity to rebut or to defend against. Nor is it reasonable for Congress, with or without evidence, to find facts of

guilt and simultaneously to prevent proof of the true
of facts.

The alien community of some three million persons
have been effectively stripped of all Constitutional pr
tion if Congress can legislate against aliens by nam
specific identification merely because there is evidenc
support a "reasonable" legislative finding that the al
so singled out are undesirable.

For it is a lesson of history that whenever and where
there has been persecution and repression, there has alw
been "evidence" of the reasonableness of the repress
Persecution always develops a justifying ideology and j
ifying evidence. The Jews were persecuted on "eviden
of ritual murders and the Protocols of Zion, and the Na
had still more "evidence" that the Jews were dangers
the state. The slaveholders had "evidence" that the Ne
had to be enslaved for the good of society and for his o
good. Persecutions of the Catholics, Protestants, Quake
Mormons, Chinese, Socialists, and members of labor unio
have always been supported by "evidence."

It is simply not safe to permit legislative determinati
of individual guilt on the basis of "evidence." If expulsi
may be ordered on such a basis, the politically impote
alien is altogether at Congress' mercy. Whatever orga
zation an alien joins or has ever joined may sometime in t
future be singled out for persecution, and when it is,
may be sure that the legislature will be acting on "e
dence" which some lawyers will be able to describe
"reasonable."

If this legislation is sustained, then Congress has
power to expel resident aliens by name or by such grou
as Jews, Catholics, or members of trade unions. In 19
Attorney General Jackson denounced as obnoxious a l
to deport Harry Bridges. Sen. Rep. 2031, 76th Cong.,
Sess., p. 7. The Attorney General did not think it mater
to consider whether Congress had evidence from which
could reasonably conclude that Mr. Bridges was an un
sirable alien.

In 1948, Attorney General Clark, testifying on a bill which is an ancestor of the Internal Security Act, said:

> "A statute which would define the nature and purpose of an organization or group by legislative fiat is likely to run afoul of the due process requirements. The Congress cannot by statute presume a state of facts that is arbitrary or that attempts to prevent proof of true facts. This we call legislative fiat.
>
> * * * * *
>
> "The fact that legislation may be subject to objection as being discriminatory cannot be overlooked. By singling out a political party or group for prohibitive legislation you may be charged with discriminatory action which would be objectionable as special legislation.
>
> "In this connection also, the protection against the passage by the Congress of any Bill of Attainder (Art. 1, 9, 3) is a most important consideration." (Hearings before Legislative Subcommittee, House Committee on Un-American Activities, Feb. 5, 1948.)

The Attorney General did not say that such legislation as he described would be valid if Congress had evidence from which it could reasonably conclude that the Communist Party was a subversive organization.

This statute can be sustained only on the basis that the Constitution does not protect present or past members or affiliates of the Communist Party. Any such assumption is untenable, unworthy, and dangerous. If the Constitution can be eliminated today for one group, it will surely be eliminated tomorrow for another.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

JOSEPH FORER
LLOYD E. MCMURRAY
ALLAN BROTSKY
Attorneys for Appellant

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In the Supreme Court of the United States

OCTOBER TERM, 1952

NO. 425

WILLIAM HEIKKILA, *Appellant*,

v.

BRUCE G. BARBER, etc., et al.,

On Appeal from the United States District Court for the Northern District of California

---

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS APPEAL

In the Supreme Court of the United States

OCTOBER TERM, 1952

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BRUCE G. BARBER, etc., et al.,

On Appeal from the United States District Court for the Northern District of California

---

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS APPEAL

The appellee moves to dismiss the appeal in the above-entitled case on the ground that it presents no substantial question that was left undecided by this Court in its decision in *Harisiades* v. *Shaughnessy*, 342 U.S. 580.

STATEMENT

This cause comes before this Court on direct appeal because the complaint attacked the constitutionality of Section 22(2)(C) and Section 4 of the Internal Security Act of 1950, 64 Stat. 1006, 8 U.S.C. 137(2)(C) and 137-3 providing for the deportation of an alien who has been at any time after entry a member of the Communist Party of the United States.

A final order of deportation had been issued against appellant on January 11, 1952, based on a finding that he, an alien, had been a member of the Communist Party of the United States and its predecessor, the Workers Party, during the years 1929 to 1939. This finding was based on admissions under oath to such effect made by appellant at a prior deportation hearing held in 1949, which had been abandoned because it had not been conducted in accordance with the procedural requirements which this Court in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, had held to be mandatory for such hearings at that period.

Appellant filed a complaint attacking the constitutionality of the statute under which the order was issued, and seeking to enjoin enforcement of the deportation order and to obtain review of the administrative action. Since the constitutionality of a statute of the United States was involved, a three-judge court was convened.

Appellee moved to dismiss the complaint on the ground that it failed to join an indispensable

party, the Commissioner of Immigration and Naturalization, and on the ground that the complaint failed to state a claim upon which relief could be granted.

On August 4, 1952, the three-judge court ordered that the action be dismissed.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THE ABOVE APPEAL

1. Section 137 of the Internal Security Act of 1950, providing for the deportation of an alien who has been, after entry, a member of the Communist Party of the United States, is attacked as an *ex post facto* law, a bill of attainder and an infringement of the First and Fifth Amendments. In *Harisiades* v. *Shaughnessy*, 342 U.S. 580, this Court rejected similar contentions addressed to the constitutionality of Section 23(a) of the Alien Registration Act of 1940, 8 U.S.C. (1946 ed.) 137, providing for the deportation of an alien who had been a member of an organization advocating the violent overthrow of the Government, as applied to aliens found to have been members of the Communist Party before 1940, even though there was no finding in those cases that the aliens themselves advocated or knew that the Communist Party advocated such violent overthrow.

The only difference between the statute involved in the instant appeal and the statute involved in the *Harisiades* case is the fact that the present statute specifies membership in the Communist

Party as a basis for deportation, thus obviating the necessity of proving in each individual case that the Communist Party was at the time of the alien's membership an organization advocating the violent overthrow of the Government. Thus, the only question of constitutionality involved in the present case which was not decided by the *Harisiades* decision is whether this specification of membership in the Party as a basis for deportation is reasonable. Specifically, as applied in this case, the question is whether the statute is reasonable as applied to membership in the Party from 1929 to 1939. That period was involved in the *Harisiades* cases where the aliens did not contest the sufficiency of the Government's proof that the Party was at such time an organization advocating the violent overthrow of the Government. In the light of the facts about the Party before 1940 known to Congress when it passed the Alien Registration Act of 1940, referred to in the *Harisiades* opinion (342 U.S. at p. 590), in the light of the facts known to Congress when it passed the Internal Security Act of 1950, referred to in this Court's opinion in *Carlson* v. *Landon*, 342 U.S. 524, 535, and in the light of the numerous decisions which have held that, in the period before 1940, the Communist Party was a party advocating the violent overthrow of the Government,[1] the

[1] *United States* v. *Dennis*, 183 F. 2d 201 (C.A. 2), affirmed, 341 U.S. 494; *Skeffington* v. *Katzeff*, 277 Fed. 129 (C.A. 1); *Ex parte Vilarino*, 50 F. 2d 582 (C.A. 9); *In re Saderquist*, 11 F. Supp. 525 (D. Me.), affirmed, 83 F. 2d 890 (C.A. 1).

reasonableness of that congressional determination certainly does not present a substantial question.

Appellant's allegations in the complaint that the Communist Party did not advocate the violent overthrow of the Government in the period of his membership obviously do not take him out of the reach of the statute which specifically makes membership in the Party in and of itself a ground for deportation. Such allegations represent merely appellant's disagreement with the reasonableness of a congressional finding which, as noted above, has been too often upheld to be now open to attack as unreasonable. The question whether, even if the Communist Party did not advocate the violent overthrow of the Government, Congress could still reasonably find that it was an organization so inimical to our principles that alien members thereof should not be accorded the privilege of remaining in this country, is highly academic in the light of the facts which recent events have brought to light as to nature of the Communist Party in the years here involved. Under the *Harisiades* opinion, it is clear that the statute is constitutional if the party could reasonably be deemed an organization advocating the violent overthrow of the government, and it is also clear that the party could in fact reasonably be deemed such an organization.

2. The question of the reviewability of deportation orders by actions other than habeas corpus is not involved in this case. The appellee did not contest the jurisdiction of the three-judge court on such ground. He did move to dismiss on the ground that an indispensible party was not joined, but also on the ground that the complaint failed to allege grounds for relief. The judgment of the three-judge court merely dismissed the action. Since, as shown above, dismissal for failure to state a cause of action was clearly proper, there will be no occasion to consider the propriety of the form of action brought by appellant.

3. Appellant's claim that his testimony, given without any claim of privilege at the prior hearing which was abandoned because of procedural irregularities, was compulsory testimony obtained in violation of the Fifth Amendment is obviously without merit. On this reasoning any testimony voluntarily given by any witness at any trial would automatically be deemed compulsory if a new trial were granted or a judgment reversed on appeal. It is well established that a witness who gives testimony without claiming the privilege has waived the privilege, and his testimony may thereafter be used against him as any other testimony. *Smith v. United States*, 337 U.S. 137, 150; *United States v. Monia*, 317 U.S. 424, 427; *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 113.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed.

ROBERT L. STERN,
Acting Solicitor General.

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No. 426

In the Supreme Court of the United States

OCTOBER TERM, 1952

WILLIAM HEIKKILA, APPELLANT

v.

BRUCE G. BARBER, INDIVIDUALLY AND AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE FOR THE THIRTEENTH IMMIGRATION DISTRICT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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ORDER BELOW

The specially convened three-judge District Court did not enter an opinion. The order of that court appears at R. 13–14.

JURISDICTION

The order of the District Court dismissing appellant's complaint (R. 13–14) was entered on August 4, 1952. A petition for appeal was filed in the District Court on September 3, 1952 (R. 14–15). Probable jurisdiction was noted by this

Court on December 8, 1952 (R. 19). The jurisdiction of this Court to review on direct appeal the judgment of the District Court denying the interlocutory injunction prayed for and dismissing appellant's complaint is conferred by 28 U. S. C. 1253.

QUESTIONS PRESENTED

1. Whether Section 10 of the Administrative Procedure Act makes deportation orders subject to judicial review otherwise than in habeas corpus proceedings.

2. If Section 10 of the Administrative Procedure Act applies, whether the Commissioner of Immigration is an indispensable party to an action seeking review of an order for appellant's deportation.

3. Whether Section 22 of the Internal Security Act of 1950, providing for the deportation of aliens who have been members of the Communist Party at any time after entering the United States, is invalid as violating the *ex post facto*, bill of attainder, free speech, or due process provisions of the Constitution.

4. Whether appellant's privilege against self-incrimination was violated by use in his deportation hearing of his previous admission of membership in the Communist Party made in an earlier deportation hearing, which had been abandoned because not held in compliance with the Administrative Procedure Act.

STATUTES INVOLVED

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, provides in part as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.
>
> (c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any prelimi-

nary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

* * * * *

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Section 19 (a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U. S. C. 155 (a), directs that any alien found subject to deportation "shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final."

The Act of October 16, 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), and the Act of June 28, 1940 (54 Stat. 670, 673, 8 U. S. C. (1946 ed.) 137), provides in pertinent part:

> Sec. 1. That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * *
>
> (c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, * * *
>
> (d) Aliens who write * * * any written or printed matter * * * advising, advocating or teaching: (1) the overthrow by force or violence of the Gov-

ernment of the United States or of
forms of law, * * *

(e) Aliens who are members of or affi
ated with any organization, association, s
ciety, or group, that writes, circulates, di
tributes, prints, publishes, or displays,
causes to be written, circulated, distribute
printed, published, or displayed, * *
written or printed matter of the charact
described in subdivision (d). * * *

Sec. 2. Any alien who was at the tim
of entering the United States, or has bee
at any time thereafter, a member of an
one of the classes of aliens enumerated
section 1 of this Act, shall, upon the wa
rant of the Attorney General, be taken in
custody and deported * * *.

Section 22 of the Internal Security Act of 195
64 Stat. 1006, amended 8 U. S. C. 137, to pr
vide in section 1 (2) for the exclusion of "Alie
who, at any time, shall be or shall have bee
members of the following classes: * * * (C
Aliens who are members of * * * (i) th
Communist Party of the United States" and
provide in section 4 (a) for the deportation
"Any alien who was at the time of entering th
United States, or has been at any time thereafte
* * * a member of any one of the classes
aliens enumerated in section 1 (2)."

STATEMENT

On July 11, 1952, appellant commenced an a
tion in the United States District Court for th

Northern District of California seeking temporary and permanent injunctions against the enforcement of an order for his deportation, a declaration of his rights with respect thereto, and review of the administrative action resulting in such order (R. 1–7). The complaint named as defendants the respondent Barber individually and as District Director of the Immigration and Naturalization Service for the Thirteenth District, together with various unnamed persons designated only as John Does 1 through 10. The complaint asserted that the jurisdiction of the District Court was based upon Section 10 of the Administrative Procedure Act, and upon 28 U. S. C. 1331 and 1346 (a) (2), which in part define the jurisdiction of district courts.

The complaint alleged that appellant had been arrested in December 1947, under a warrant of arrest charging him with violation of the immigration laws in that he was then a member of an organization which advocated the overthrow of the government of the United States by force and violence. Hearings were held in 1949 before a hearing officer of the Immigration and Naturalization Service, but were discontinued after the decision of this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (R. 2–3) that deportation hearings must be conducted in accordance with the Administrative Procedure Act. New hearings were conducted in June 1950, and continued in November 1950. At the June 1950 hearing, there

was introduced in evidence a portion of the tra
script of the 1949 hearing in which appella
admitted that he had been a member of th
Workers Party and of the Communist Part
from 1929 to 1939 (R. 3). At the hearings in N
vember 1950, a new charge was laid against appe
lant under Section 22 of the Internal Security A
of 1950, charging him with having been, after entr
a member of the Communist Party. The hearin
officer recommended appellant's deportation o
the ground that the charge laid under the Interna
Security Act of 1950 had been established by th
admission contained in the transcript of the 194
hearings introduced in evidence. On appeal, th
hearing officer's decision was affirmed on July 1
1951, by the Assistant Commissioner, Adjudica
tions Division, and on January 11, 1952, by th
Board of Immigration Appeals (R. 5).

Appellant alleged that the 1950 hearings de
prived him of due process of law in that, at th
June hearing, the Hearing Examiner, althoug
appointed in accordance with Section 11 of th
Administrative Procedure Act, was not an im
partial hearing officer as required by that Ac
in that he was a former employee of the Immigra
tion and Naturalization Service with experienc
in investigation, prosecution and hearings wit
regard to aliens. It was further alleged that a
the hearing in November 1950, the hearing office
functioned without compliance with the Adminis
trative Procedure Act on the theory that, by rea

son of the enactment of the Supplemental Appropriations Act (64 Stat. 48, 8 U. S. C., Supp. V, 155a) the Administrative Procedure Act no longer applied (R. 3–4). He also alleged that the admission of the transcript of the 1949 hearing at the 1950 hearings deprived him of due process of law and of his privilege against self-incrimination (R. 3).

In addition, appellant alleged that the Workers Party and the Communist Party, during the period from 1929 to 1939 were not organizations which believed in, advocated or advised the overthrow of the government of the United States by force and violence, and that he personally did not at any time advocate such violent overthrow. He alleged that the hearing officer's rejection of his offer to prove such allegations deprived him of due process of law. He further alleged that Section 22 of the Internal Security Act was unconstitutional as a bill of attainder and an *ex post facto* law in violation of Article I, Section 9, Clause 3, of the Constitution, and a deprivation of the guarantees of free speech and due process of law under the First and Fifth Amendments (R. 5–6).

Respondent moved to dismiss the complaint on the grounds (1) that an indispensable party, i. e., the Commissioner of Immigration and Naturalization, who had ordered that appellant be deported, had not been joined as a party and (2) that the complaint failed to state a claim

upon which relief could be granted since p
tioner had been accorded a fair hearing, Sec
22 of the Internal Security Act of 1950 was c
stitutional, and appellant had an adequate rem
at law (R. 8–9).

On August 4, 1952, a three-judge court, wh
had been convened pursuant to 28 U. S. 2
(R. 7–8), granted the motion to dismiss the c
plaint (R. 13–14).

SUMMARY OF ARGUMENT[1]

I

For the reasons set forth in the respondc
brief in *Martinez* v. *Neelly*, No. 218, this Te

[1] The appellant does not urge in his brief (except in
specification of errors) his contention that he was depr
of due process of law and of the protection of the Adm
trative Procedure Act, in that the deportation hearin
June 1950 was presided over by a hearing examiner,
pointed pursuant to Section 11 of that Act, who, prior to
appointment, had conducted investigations, prosecutions
hearings for the Immigration and Naturalization Ser
In any event, the contention is without merit unless it ca
said that no prosecutor should ever be made a judge. M
over, by the time of the deportation hearing in Noven
1950, when there was lodged the charge upon which appel
was ordered deported, Congress had provided in the Sup
mental Appropriation Act, 1951 (64 Stat. 1044, 1048) e
tive September 27, 1950, that Sections 5, 7 and 8 (and
necessary implication Section 11) of the Administrative
cedure Act, should not apply to deportation proceedi
Also, appellant does not even suggest how he could have
prejudiced by the background of the hearing officer, since
deportation order is based solely upon appellant's admis
of membership in the Communist Party.

pp. 18–46, we contend that the order for appellant's deportation was reviewable only in habeas corpus proceedings.

II

For the reasons set forth in the same brief, at pp. 46–52, we contend that the Commissioner of Immigration (or the Attorney General) is an indispensable party to this action seeking judicial review of a deportation order, and cannot be sued in the Northern District of California.

III

Section 22 of the Internal Security Act of 1950, in providing for the deportation of aliens who have been members of the Communist Party of the United States at any time since entry into the United States, is a valid determination by Congress that past and present alien members of the Communist Party are undesirable residents of the United States. Congress based this determination upon overwhelming evidence received by its committees between 1931 and 1950, that the Communist Party of the United States has as its purposes the violent overthrow of the Government of the United States and serving as a fifth column for the Soviet Union. These conclusions are buttressed by repeated judicial decisions as to the nature and purposes of the Communist Party from 1920 to the present time, and by the record of persistent espionage, sabotage, and propaganda by Communists here and elsewhere on behalf of

Most of the grounds upon which appellant challenges the validity of Section 22 have been resolved adversely to him by this Court's recent decision in *Harisiades* v. *Shaughnessy*, 342 U. S. 580. That case involved the validity of Section 23 (a) of the Alien Registration Act of 1940, 8 U. S. C. (1946 ed.) 137, which made subject to deportation aliens who, at any time after entry, had been members of an organization advocating the overthrow of the government of the United States by force and violence, as applied to aliens found to have been members of the Communist Party before 1940, even though there was no finding that the aliens themselves advocated or knew that the Communist Party advocated such violent overthrow. The statute was upheld against contentions that it was unconstitutional as an *ex post facto* law and an infringement of the First and Fifth Amendments.

The holding in *Harisiades* that deportation is not a punishment for the purposes of the *ex post facto* clause of Article I, Section 9, of the Constitution, disposes of appellant's contention that Section 22 is a bill of attainder (as well as an *ex post facto* law), since a bill of attainder is a legislative act which inflicts *punishment* without trial. *United States* v. *Lovett*, 328 U. S. 303, 315.

The only difference between the presently pertinent portion of Section 22 of the 1950 Act and the statute involved in the *Harisiades* case is the

(C. A. 1) (1930–1935); *United States ex rel. Harisiades* v. *Shaughnessy,* 187 F. 2d 137 (C. A. 2) (1925–1939); *United States* v. *Dennis,* 183 F. 2d 201 (C. A. 2) (1945–1948).

Section 22 is valid. In the course of affirming the *Dennis* conviction (341 U. S. 494), in upholding the related deportation provisions in the same Alien Registration Act of 1940, (*Harisiades* v. *Shaughnessy, supra*), and in upholding the anti-Communist affidavit requirement of the Taft-Hartley Act (*American Communications Ass'n* v. *Douds,* 339 U. S. 382), this Court has recognized that the facts revealed by judicial trials and Congressional investigations beginning in 1931 (H. Rep. 2290, 71st Cong., 3d Sess.) down to date, when read in the light of recent political and military developments, and underscored by persistent espionage and other fifth column activity by Communists in this country and elsewhere on behalf of the Soviet Union, amply justify the conclusion of Congress that past and present alien members of the Communist Party of the United States are undesirable residents. Against that background, this Court in *Carlson* v. *Landon,* 342 U. S. 524, 535–536, noted with respect to Section 22 of the Internal Security Act that:

> * * * Theretofore there was a provision for the deportation of alien anarchists and other aliens, who are or were members of organizations devoted to the overthrow by force and violence of the

> Government of the United States, but the Internal Security Act made Communist membership alone of aliens a sufficient ground for deportation. * * * We have no doubt that the doctrines and practices of Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists under its power to regulate the exclusion, admission and expulsion of aliens. * * *

Thereafter, in the *Harisiades* case, this Court upheld the provision of the Alien Registration Act of 1940 directing the deportation of any alien who had at any time since entry been a member of an organization advocating the violent overthrow of the Government of the United States. In doing so, this Court held that the expulsion of alien Communists was based upon the following propositions (342 U. S. at 589, 590):

> * * * any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. * * *.
>
> * * * Certainly no responsible American would say that there were then or are now no possible grounds on which Congress

fact that the 1950 Act specifies membership in the Communist Party as a basis for deportation, thus obviating the necessity of proving in individual cases that the Communist Party was at the time of the alien's membership an organization advocating the violent overthrow of the Government. But Congress has found that the Communist Party of the United States is maintained under the control of the Soviet Union largely through alien Communists. Drawing on the analogy of the Alien Enemy Act of 1798 (50 U. S. C. 21), it has specifically designated past and present members of the Communist Party as undesirable residents of the United States. In view of the purposes of the Party as found by Congress, Section 22 is a reasonable exercise of the power of Congress to provide for the deportation of any class of aliens whose presence in this country may endanger the security of the United States.

IV

The appellant's assertion that his privilege against self-incrimination was violated when there was received in the deportation hearing in 1950 his testimony in a 1949 hearing that he had been a member of the Communist Party from 1929 to 1939, is without merit. Appellant waived the privilege by his failure to assert it either in the 1949 hearing when he gave the testimony, or when it was received in the 1950 hearing.

ARGUMENT

I

DEPORTATION ORDERS MAY BE REVIEWED BY THE COURTS ONLY IN HABEAS CORPUS PROCEEDINGS

The complaint in this case, seeking an injunction against enforcement of the order of deportation, a declaration of the rights of the parties under the order, and a "review of agency action" (R. 7), obviously has been framed on the theory that Section 10 of the Administrative Procedure Act has made deportation orders reviewable by the courts in proceedings other than habeas corpus. We submit that the judgment below should be affirmed upon the ground that review of deportation orders otherwise than in habeas corpus proceedings is not made available by Section 10, and that the district court was therefore without jurisdiction of the suit. The reasons underlying our contention are set forth fully in the respondent's brief in *Martinez* v. *Neelly*, No. 218, this Term (affirmed by an equally divided Court January 12, 1953), pp. 18–46, to which we respectfully refer the Court.

II

THE ATTORNEY GENERAL OR THE COMMISSIONER OF IMMIGRATION IS AN INDISPENSABLE PARTY TO THIS ACTION

In the court below, the Government's motion to dismiss the complaint was based in part upon the ground that the Commissioner of Immigration

was an indispensable party to an action to review the order for appellant's deportation, and that he was not and cannot be sued in the Northern District of California (R. 8). For the reasons set forth at pp. 46–56 of the respondent's brief in *Martinez* v. *Neelly, supra,* we submit that the judgment below should be affirmed upon the ground that the district court was without jurisdiction because of such failure to join the Commissioner (or the Attorney General) as a party.

In this case, as in *Martinez* v. *Neelly, supra,* the decision of the hearing examiner or inspector was affirmed upon appeal by the Assistant Commissioner, Adjudications Division, and by the Board of Immigration Appeals. In the *Martinez* case, the warrant of deportation directing that the alien be arrested and deported was signed by the Assistant Commissioner, Enforcement Division (*Martinez* v. *Neelly, supra,* resp. br. p. 48). In the instant case, the warrant of deportation was signed on November 29, 1951, by the appellee Barber as District Director, San Francisco District of the Immigration and Naturalization Service, pursuant to 8 C. F. R. (1951 Supp.) 152.2 (a) which provided that "The officer in charge of the appropriate district, the Assistant Commissioner, Enforcement Division, or the Commissioner, shall have the authority to issue a warrant of deportation in any case in which an order of deportation has become final." However, under the rationale of the Third Circuit's decision

in *Paolo* v. *Garfinkel*, Dec. 8, 1952 (reproduced as Appendix B of respondent's brief in *Martinez* v. *Neelly, supra*), this distinction would not seem to be significant, unless a decree against the appellee Barber is deemed to preclude his superiors the Commissioner and Assistant Commissioner from issuing a warrant for the deportation of appellant.

III

CONGRESS HAS THE POWER TO PROVIDE FOR THE DEPORTATION OF ALIENS WHO AT ANY TIME AFTER ENTRY INTO THE UNITED STATES HAVE BEEN MEMBERS OF THE COMMUNIST PARTY OF THE UNITED STATES

If the issue of the constitutionality of Section 22 of the Internal Security Act is reached, most of appellant's objections to the statute already have been resolved against him by this Court's decision in *Harisiades* v. *Shaughnessy*, 342 U. S. 580. In that case, this Court upheld the constitutionality of Section 23 (a) of the Alien Registration Act of 1940, 8 U. S. C. (1946 ed.) 137 which made subject to deportation aliens who at any time after entry, had been members of an organization advocating the overthrow of the government of the United States by force and violence, as applied to aliens found to have been members of the Communist Party before 1940 even though there was no finding that the particu

lar aliens advocated or knew that the Communist Party advocated such violent overthrow. The statute was upheld against contentions that it was unconstitutional as an *ex post facto* law and an infringement of the First and Fifth Amendments.

The only difference between the pertinent portion of Section 22 of the 1950 Act and the statute involved in the *Harisiades* case is the fact that Section 22 specifies past or present membership in the Communist Party of the United States as a basis for deportation, thus obviating the necessity of proving in each individual case that the Communist Party was at the time of the alien's membership an organization advocating the violent overthrow of the government of the United States.

This Court held in *Harisiades* that even if the 1940 Act "were found to be retroactive," it would not constitute an *ex post facto* law in violation of Article I, Section 9, of the Constitution, reiterating that deportation is not a punishment to which alone the *ex post facto* prohibition is applicable. The related prohibition of Article I, Section 9, against bills of attainder also applies only to legislative acts which inflict *punishment* without a judicial trial. *United States* v. *Lovett,* 328 U. S. 303, 315. Thus, the *Harisiades* decision disposes of appellant's contention that Section 22, in providing specifically for the deportation of aliens who are former members of the Com-

munist Party, is invalid both as an *ex post facto* law and as a bill of attainder.

Similarly, *Harisiades* resolved adversely appellant's contention that Section 22 violates the due process clause of the Fifth Amendment because it provides for the deportation of an alien for past or present membership in a proscribed organization without regard as to whether the alien shared or knew the purposes of the organization.[2]

The *Harisiades* decision left unresolved only the appellant's further contention that Section 22 violates the due process clause because it denies an alien an opportunity to show that the nature and purposes of the Communist Party during the period of his membership were not such as to justify his deportation because of such membership. Section 22 has and was intended by Congress to have that effect. We contend that it is a reasonable exercise of the power of

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[2] Thus, in the Government's brief in the *Harisiades* case, p. 91, it is stated that,

> "some former members of the organization may have been unaware of or not in personal agreement with the policy of forcible overthrow. On these records, it must be assumed that there is no proof that these appellants had such personal beliefs or knowledge. In view of its interpretation of the statute as not requiring proof of more than past membership and the nature of the organization, the Immigration Service has not deemed it necessary to introduce evidence on these subjective matters in its deportation proceedings."

Congress to control aliens in the interest of the security of the United States.

The history of Section 22. Section 22 of the Internal Security Act, like the 1940 statute which was upheld in the *Harisiades* case, reflects long and continuous consideration by Congress of the nature and purposes of the Communist Party of the United States.

In 1931, during the period of appellant's membership in the Party, a special committee of the House investigated and reported on Communist Propaganda in the United States (H. Rep. 2290, 71st Cong., 3d Sess.). That committee cited the language of the program of the Communist Party as established by the Comintern at the Sixth World Congress, September 1, 1929, at Moscow to the effect that:

> The communists consider it unworthy to dissimulate their opinions or their plans. They proclaim openly that their designs can only be realized by the violent overthrow of the entire traditional social order. [H. Rep. 2290, *supra,* p. 15.]

The report concluded that:

> It is self-evident that the communists and their sympathizers have only one real object in view, not to obtain control of the Government of the United States through peaceful and legal political methods as a political party, but to establish by force and violence in the United States and in all other nations a "soviet socialist repub-

lic" to which they often refer in their literature as a "dictatorship of the proletariat." These facts have been repeatedly substantiated at the hearings of the committee. [H. Rep. 2290, *supra*, pp. 65–66.]

In 1935, the McCormack committee of the House, which was charged with the investigation of Nazi and other propaganda, found "both from documentary evidence submitted to the committee and from the frank admission of Communist leaders * * *" that the objectives of the Party included the overthrow by force and violence of the Government of the United States. H. Rep. 153, 74th Cong., 1st Sess. (1935) p. 12. It concluded that the Party "is a party recognized on an international scale, governed and controlled by a constitution and rules emanating from the Communist International with headquarters at Moscow in the Soviet Union, and dedicated to the overthrow of the government by violence and force." H. Rep. 153, *supra*, p. 21.

In 1939, extensive hearings before the House Committee on Un-American Activities informed Congress that in 1929 the Soviet Union, acting through the Communist International ejected Lovestone and Gitlow from the leadership of the Communist Party of the United States and replaced them with Foster and Browder.[3] Current

[3] Hearings before House Committee on Un-American Activities on H. Res. 282, 76th Cong., 1st Sess. (1939) vol. 7, pp. 4432, 4671.

evidence of foreign control of the Party was furnished to Congress when, with the signing of the Hitler-Stalin Pact in August 1939, resistance to Nazi aggression suddenly became an "imperialist war" in the view of American Communists. Also, between 1938 and April 1940, Congress had observed how the ideological allies of Hitler in Austria, Czechoslovakia and Norway had aided in subjecting those countries to Nazi rule.

Thus, by 1940, Congress was not merely concerned with the old-fashioned concept of domestic insurrection, but with the more subtle and dangerous situation in which a local totalitarian political group, whether Communist or Nazi, is the actual or potential fifth column ally of the totalitarian government by which it is controlled. Section 23 (a) of the Alien Registration Act of 1940, in making deportable aliens who had at any time been members of a group advocating the violent overthrow of the government, was part of a larger statute, part of which, known as the Smith Act was upheld by this Court in *Dennis* v. *United States*, 341 U. S. 494, and part of which required the registration of aliens. Indeed, the same Congress also enacted the Voorhis Act of October 17, 1940,[4] requiring the registration of "Every organization subject to foreign control which engages in political activity," and understood that the

[4] 54 Stat. 1201, 18 U. S. C. 2386.

Communist Party of the United States would be required to register.[5]

Between 1940 and 1950, Congress observed that Communist parties everywhere are simply the fifth column of Soviet aggression. Where they have obtained power, as in Czechoslovakia, they have done so by violence, destroyed their political opponents, and degraded their native lands into satellites of the Soviet Union. Where they have not obtained power, they carry on, in the United States and elsewhere, espionage, sabotage, and propaganda on behalf of the Soviet Union. At the present time, American troops are fighting with the United Nations in Korea to check Communist aggression, while this country has entered into costly and unparalleled military alliances to discourage Communist aggression elsewhere.

Section 22 of the Internal Security Act originated in S. 1832, 81st Cong., 2d Sess., which was passed by the Senate on August 9, 1950, and was later incorporated by the Senate into the internal security bill (S. 4037, 81st Cong., 2d Sess.). S. 1832 was introduced by Senator McCarran in May 1949, and was the subject of extensive hearings between May and September 1949, before the Subcommittee on Immigration and Natural-

[5] H. Rep. 2582, 76th Cong., 3d Sess. Immediately, the Communist Party of the United States ostensibly withdrew from the Communist International to avoid registration under the Voorhis Act. See resolution adopted at the 1940 Convention of the Communist Party, reproduced in the record in *Dennis* v. *United States*, 341 U. S. 494, vol. XIV, pp. 11180–11181.

ization of the Senate Committee on the Judiciary, under the heading of *Communist Activities Among Aliens and National Groups.*

After these hearings,[6] S. 1832 was revised to provide, *inter alia,* for the deportation of aliens who have at any time been members of the Communist Party of the United States. It was passed by the Senate without debate (96 Cong. Rec. 12058, 12060). However, the accompanying report of the Senate Committee on the Judiciary (S. Rep. 2230, 81st Cong., 2d Sess.), after summarizing and quoting from the testimony of former high officials of the Communist Party during the 1949 hearings, set forth the conclusions upon which the provision is based, as follows (pp. 10, 11, 12, 16):

> Since the rise of Soviet Russia during the past three decades, the problem of subversives has become a vital consideration in any evaluation of national immigration and naturalization policies. The impact of world events upon our immigration system can no longer be ignored. As an international conspiracy, communism has organized systematic infiltration of our borders for the purpose of overthrowing the democratic Government of the United States by force, violence, and subversion.
>
> * * * * *

[6] As originally introduced, S. 1832 would have provided stricter controls over visas and other travel documents, and strengthened the laws governing the exclusion and deportation of subversive aliens, without specifically referring to the Communist Party of the United States.

The Communist International has in its employ a network of agents whose sole function is to organize and promote Communist activity, sabotage, espionage, propaganda, and terrorism. These agents are sent into the United States and other countries under the policy of the Communist high command. Although some of the agents are native-born Americans or have acquired citizenship through naturalization, a large majority of them are aliens.

* * * * *

The Comintern realizes that it cannot rely on native Americans because to do so involves the constant risk of having its work impeded or exposed. It is to be expected that the loyalty of a native American or of a citizen of long standing would occasionally reassert itself, despite the most intensive Communist indoctrination.

The break with the Communist Party by men like Louis Budenz, Howard Rushmore, Jay Lovestone, Benjamin Gitlow, and others offers conclusive proof to Moscow that it can only rely on its own chosen agents for the work of destroying America. In the event of a clash of arms between the Soviet homeland and this country, the Communists would find it even more difficult to rely upon native Americans and those of foreign origin who become Americanized. * * *

* * * * *

It is a well-established fact that both the leadership and membership of the Com-

munist Party is recruited overwhelmingly from alien ranks. During the course of its 30 years of existence in this country the Communist Party has been ruled exclusively by alien agents appointed by the Communist International headquarters in Moscow.

The high command of the party in this country invariably has been dominated by aliens or persons of foreign origin. These facts have been documented by the testimony presented before the subcommittee.

* * * * *

From the statements made before the subcommittee, as well as the general evidence gathered—the history of the Communist movement, the changes of its policies, the manner of its expression, the utterances of the Comintern leadership—the conclusion is inescapable that the Communist Party and the Communist movement in the United States is an alien movement, sustained, augmented, and controlled by European Communists and the Soviet Union. The severance of this connection and the destruction of the life line of communism becomes, therefore, substantially an immigration problem.

After reviewing existing law, the Committee noted (p. 24–25) that:

* * * While Congress has clearly proscribed classes of aliens which are to be excluded from admission or deported after admission, there is the obvious difficulty of establishing that certain aliens or organ-

> izations do advocate overthrowing the Government by force or violence. It is inherent in the tactics of such persons and organizations that their real intentions be concealed under an aura of legitimacy in order to accomplish their purpose. Thus, though it may be common knowledge that certain organizations advocate such beliefs, satisfactory proof of that position offers a formidable obstacle. The evidence developed by the subcommittee should remove any doubt about the Communist Party's advocating the overthrow of our Government by force or violence in order to consummate its plans of a world-wide Communist totalitarian dictatorship. Yet, membership in the Communist Party, without positive proof that it so advocates the overthrow of government by force and violence, is insufficient grounds for deporting such an alien member.

The substance of the Committee's conclusions is embodied in the extraordinary findings which Congress made in Section 2 of the Internal Security Act as to the purposes and methods of communism, "As a result of evidence adduced before various committees of the Senate and House of Representatives."

The bitter debate over the internal security bill did not relate to Section 22. Indeed, the dissenting minority of the Senate Committee on the Judiciary stated that "We do not quarrel with the provision * * * for the exclusion

of alien members of the Communist Party of the United States, or with the later provision [Section 22 of the Internal Security Act] for their deportation. It is undisputed that the Communists of the world, including the United States, are the fifth column allies of the Soviet Union." Rep. 2369, Part 2, 81st Cong., 2d Sess., p. 14.

Section 22 is thus a substantially unanimous Congressional determination that the Community Party of the United States has at all times been a foreign-controlled organization devoted to the ultimate overthrow of the government by violence and, more immediately, acting as a fifth column in aid of Soviet aggression.[7]

This conclusion of Congress is supported not only by its own investigations but by repeated judicial and administrative determinations that the Communist Party at various times advocated the violent overthrow of the government of the United States. *Skeffington* v. *Katzeff*, 277 Fed. 129 (C. A. 1) (covering the period 1919–1920); *Ex parte Vilarino*, 50 F. 2d 582 (C. A. 9) (1926–1929); *Murdoch* v. *Clark*, 53 F. 2d 155 (C. A. 1) (the 1920's); *United States ex rel. Yokinen* v. *Commissioner of Immigration*, 57 F. 2d 707 (C. A. 2) (the late 1920's); *Kjar* v. *Doak*, 61 F. 2d 566 (C. A. 7) (the late 1920's); *In re Saderquist*, 11 F. Supp. 525 (D. Me.), affirmed, 83 F. 2d 890

[7] Section 22 has been embodied in the Immigration and Nationality Act of 1952 (Pub. Law 414, 82d Cong.) as Section 241 (a) (6) of that Act.

might believe that Communists in our midst are inimical to our security.

Congress received evidence that the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists.

By providing, in Section 23 (a) of the Alien Registration Act, for the deportation of past and present members of any organization advocating the violent overthrow of the government, Congress eliminated the administrative burden of distinguishing between aliens who had sincerely abandoned Communist principles and those who had not. This Court held in *Harisiades v. Shaughnessy, supra,* at pp. 595–596:

> When the Communist Party as a matter of party strategy formally expelled alien members en masse, it destroyed any significance that discontinued membership might otherwise have as indication of change of heart by the individual. Congress may have believed that the party tactics threw upon the Government an almost impossible burden if it attempted to separate those who sincerely renounced Communist principles of force and violence from those who left the party the better to serve it. Congress, exercising the wide discretion that it alone has in these matters, declined to accept that as the Government's burden.

By providing specifically in Section 22 of the Internal Security Act for the deportation of aliens "who, at any time, shall be or shall have been members of * * * the Communist Party of the United States," Congress has, in practical effect, done no more than eliminate the burden of introducing again and again in such deportation proceedings evidence as to the nature and activities of the Communist Party.[8]

In deportation proceedings under the 1940 Act, the government's evidence as to the Party's advocacy of political violence routinely consists of certain documentary evidence plus the testimony of one or more persons who were key members of the Party during the period of the alien's membership. Erratic and discriminatory enforcement would be the result if in different cases, involving substantially the same evidence, administrators and courts arrived at different conclusions as to whether the Communist Party advocated the violent overthrow of the government. Thus, by Section 22 Congress has simply

[8] See *Milasinovich* v. *The Serbian Progressive Club*, 369 Pa. 26, and *In re Albert*, Pa. Sup. Ct., Nov. 25, 1952, 21 U. S. Law Week 2256, in which the Supreme Court of Pennsylvania held that judicial notice may be taken of the fact that the Communist Party advocates the overthrow of the government by force. In the latter case, the court stated that:

"It would seem almost an absurdity of legal procedure to continue to submit to various juries in individual cases a question so readily and authoritatively determinable from the mere perusal of the writings of the acknowledged founders and protagonists of the Communist movement * * *."

substituted for a process of proof in individua cases a uniform rule based upon both its own inves tigations and the result of judicial and administra tive proceedings.

More broadly, Congress was proceeding by con scious analogy [9] to the Alien Enemy Act of 179 which authorizes the deportation of aliens who are nationals of a country at war with the United States or by which invasion of American terri tory is "threatened". As this Court noted in *Har isiades* v. *Shaughnessy, supra,* at p. 587:

> War, of course, is the most usual occasion for extensive resort to the power. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deporta tion into existence or to authorize its exer cise. Congressional apprehension of for eign or internal dangers short of war may lead to its use.

By the Alien Enemy Act, Congress conferred upon the President power to deport aliens who are nationals of a hostile country without regard to whether a particular alien has ever evidenced

[9] See S. Rep. 2230, 81st Cong., 2d Sess., pp. 16–17; *The Immigration and Naturalization Systems of the United States*, S. Rep. 1515, 81st Cong., 2d Sess., pp. 788–789.

the slightest hostility to the interests of the United States.[10] Presidential action under the Act is reviewable only upon the issue of whether the particular alien falls into the category of enemy aliens. *Ludecke* v. *Watkins*, 335 U. S. 160. By the 1940 statute upheld in *Harisiades*, Congress provided for the deportation of past and present alien members of an organization advocating the violent overthrow of the Government, again without regard to a particular alien's knowledge of or share in such objective. Thus, the power of Congress to provide for the deportation of classes of aliens to protect the security of the United States is settled.

It is clear that this power of Congress can be exercised in a manner relevant and appropriate to the apprehended danger. The Alien Enemy Act dealt with problems of internal security created by actual or threatened hostilities between national states and with the techniques of warfare which existed in the early 19th century. In 1950, Congress was dealing with the threat to its peace and security then and now confronting the United States. It has found that Communists everywhere have as their objectives the violent over-

[10] That the Fifth Congress which enacted the Alien Enemy Act did not regard the use of its powers over aliens to protect the security of the nation as limited to periods of actual war, is emphasized by the fact that the House twice rejected proposals to delete the words "or threatened". Annals of Congress, 5th Cong., 2d Sess., pp. 1786, 1792.

throw of non-Communist governments and serving the interests of the Soviet Union. It has found that "the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists." It has concluded, in effect, that the possibilities of political violence and treachery, particularly in a time of crisis, on the part of alien members of the Communist Party are too great for the United States to assume the risks of attempting to distinguish between those members of the Party who have knowledge of and share its purposes, and those who do not, or of determining the sincerity of those who assert they have left the Party and rejected its principles.

If a statute passed during time of war specifically named the enemy countries whose citizens were to be detained or deported, it would be just as valid as if it referred to "enemies" generally, with precisely the same intention and meaning. The Constitution certainly does not bar treating in the same way alien members of an organization which the past thirty years have demonstrated to be merely the *alter ego* of an aggressive Communist state.

Unlike the Alien Enemy Act, the applicability of Section 22 is determined, not by the accidents of birth and ancestry, but by an alien's voluntary membership in the Communist Party. As this

Court said in *American Communications Association* v. *Douds*, 339 U. S. 382, 391:

> The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of government action, does not lead to the conclusion that such circumstances are never relevant. * * * If accidents of birth and ancestry under some circumstances justify an inference concerning future conduct, it can hardly be doubted that voluntary affiliations and beliefs justify a similar inference when drawn by the legislature on the basis of its investigations.

Moreover, the appellant's contention (App. Br. pp. 40–41) that applying Section 22 to him because of his admitted membership in the Communist Party from 1929 to 1939 involves unfair surprise, is fully answered by this Court's observation in *Harisiades* v. *Shaughnessy*, *supra*, at p. 593:

> During all the years since 1920 Congress has maintained a standing admonition to aliens, on pain of deportation, not to become members of any organization that advocates overthrow of the United States Government by force and violence, a category repeatedly held to include the Communist Party. These aliens violated that prohibition and incurred liability to deportation. They were not caught unawares by a change of law. There can be no con-

tention that they were not adequately fore warned both that their conduct was pro hibited and of its consequences.

We submit that upon the basis of the over whelming testimony received by Congress, con firmed by events of common knowledge, as to th purposes of the Communist Party and as to th major role played by aliens in organizing th Party and keeping it under the control of th Soviet Union, Section 22 is a reasonable exercis of Congress' plenary powers over aliens to pro tect the security of the United States.

IV

There Was No Violation of Appellant's Privilege Against Self-Incrimination

Appellant also contends that the order of de portation against him is invalid because base upon evidence received in violation of his privi ege against self-incrimination. Specifically, h points out that in the June 1950 hearing, ther was introduced a portion of the transcript o record of the earlier hearing, in 1949, in whic he had testified that he had been a member o the Communist Party from 1929 to 1939 (R. 3) He alleges that this receipt of his earlier testi mony violates his privilege against self-incrimina tion under the Fifth Amendment.

Appellant bases his claim of privilege upon th ground that evidence as to his past membershi

in the Party would tend to incriminate him under the Smith Act, as this Court has held. *Brunner* v. *United States*, 343 U. S. 918; *Blau* v. *United States*, 340 U. S. 159.

But the appellant does not allege that during the June 1950 deportation hearing he objected to the admission of his earlier testimony that he had been a member of the Communist Party. Clearly, his privilege against self-incrimination was waived if he failed to assert it. *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113; *Rogers* v. *United States*, 340 U. S. 367, 370-371. Absent even an allegation that he made a timely assertion of his privilege when his prior testimony was introduced during the June 1950 hearing, appellant cannot now be heard to contend that its admission was improper.[11]

Moreover, even if appellant had asserted the privilege during the June 1950 hearing when his earlier testimony was introduced, that testimony would have been admissible since it was given in the 1949 deportation hearing without any claim

[11] In fact, the administrative deportation record, which is not a part of the record before this Court, shows that neither during the hearing nor in his exceptions to the hearing examiner's decision did appellant assert his privilege against self-incrimination. Appellant also contends that it was not incumbent upon him to assert his claim of privilege in the 1950 hearing because his earlier testimony, given without a claim of privilege, was already usable against him in a Smith Act prosecution. We agree, and for the same reason it was usable against him in a subsequent deportation hearing.

of privilege by appellant.[12] It has been held repeatedly in a variety of situations that evidence given without claim of privilege or admissions made in the course of an earlier legal proceeding, are admissible thereafter notwithstanding a claim of privilege. *Perlman* v. *United States*, 247 U. S. 7; *Powers* v. *United States*, 223 U. S. 303; *Schoeps* v. *Carmichael*, 177 F. 2d 391, 396–398 (C. A. 9); *Milton* v. *United States*, 110 F. 2d 556, 559–560 (C. A. D. C.); *Heller* v. *United States*, 57 F. 2d 627, 629 (C. A. 7); *Orth* v. *United States*, 252 Fed. 569 (C. A. 4); *United States* v. *Mary Helen Coal Corp.*, 24 F. Supp. 50 (E. D. Ky.); *United States* v. *Lindsly*, 7 F. 2d 247, 255 (E. D. La.), reversed on other grounds, 12 F. 2d 771 (C. A. 5). And see Annotation, *Use in Subsequent Prosecution of Self-Incriminating Testimony Given Without Invoking Privilege*, 5 A. L. R. 2d 1404.[13]

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[12] Appellant was represented by counsel of his choice when he testified in the 1949 hearing as to his membership in the Communist Party.

[13] Appellant seeks to be excused from his failure to assert his privilege during the June 1949 hearing on the ground that not until August 1949, was it known that the government considered "that membership in the Communist Party was evidence of subversive activity in violation of the Smith Act" (App. Br. pp. 59–60). This is incorrect. The *Dennis* indictment was returned in July 1948, and the Court of Appeals for the Ninth Circuit has held that proof of the *Dennis* prosecution "together with the public anti-Communist agitation and that in Congress" justified witnesses before a grand jury in October 1948 in refusing to answer questions relating to the Communist Party. *Alexander* v. *United States*, 181 F. 2d 480, 482–485.

Under these decisions, the use of his earlier sworn testimony at the second hearing was no different than the use of a deposition against him. The fact that the testimony was made at a hearing which would not support a deportation order because of this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, does not prevent appellant's statements from being used as admissions. Wigmore, *Evidence* (3d ed. 1940), Section 1048, 2276.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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IN THE

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Appeal from the United States District Court for the Northern District of California

PETITION FOR REHEARING AND SUGGESTION FOR MODIFICATION OF OPINION

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---

PETITION FOR REHEARING AND SUGGESTION FOR MODIFICATION OF OPINION

Appellant petitions for a rehearing of the decision of the Court rendered on March 16, 1953. If rehearing is denied, appellant suggests that the Court modify its opinion in the respect stated below.

I.

The decision of the Court hinges on its construction of the finality provision of section 19(a) of the Immigration Act of 1917. This act is no longer in effect, and the opinion expressly states (footnote 4) with respect to the current immigration legislation: "We do not consider the 1952 Act, 66 Stat. 163, which took effect after Heikkila's complaint was filed."

In our view, the 1952 Immigration and Nationality Ac authorizes injunctive review of deportation orders, and thi is an appropriate case in which to consider and decide tha such is the case.

Appellant believes that injunctive review is permitte under the 1952 Act, and he does not wish to be subjecte to the restraints and indignities which the appellee seek to visit on him under the supervision requirements of sec tion 242(d) of the Act (8 U.S.C. 1252(d)). Accordingly if rehearing is denied, he contemplates instituting a new injunction proceeding to review the validity of the deporta tion order, entered under what he considers to be an un constitutional statute. Thus the only effect of the Court' decision is to set appellant back at the beginning of the lon road to this Court which he has already once travelled. I appellant retraces the journey, he will end up by presentin to the Court the identical procedural and substantive ques tions which are now before the Court, as to which the Cour noted probable jurisdiction, which have been argued an briefed before the Court, and which can now be readil and appropriately disposed of.

Other litigants who have instituted injunction proceed ings to review deportation orders are in a similar situation No matter how far these proceedings may have advanced the plaintiffs will, under the present decision, have thei suits dismissed, with the sole result of compelling them t institute new injunction suits in reliance on the 1952 Act Such a result, we submit, is not in the interests of the efficient administration of the immigration laws or of judi cial review.

The government itself has recognized that it would be appropriate for the Court to consider the effect of the 1952 Act even when the suit was brought before the Act was effective. For in the *Martinez* case the government briefed the availability of injunctive review under the 1952 Act.

II.

That injunctive review of deportation orders is permitted under the 1952 Act appears from its text and its history.

Section 242(b) of the 1952 Act (8 U.S.C. 1252(b)) contains a finality provision as follows:

> In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final.

In its context, it is clear that this finality provision was not intended by Congress to limit judicial review to the habeas corpus remedy. Thus the following subsection, 242(c), provides (emphasis supplied):

> (c) When a *final* order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, *if judicial review is had*, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, *released on bond* in an amount and containing such conditions as the Attorney General may prescribe, or *released on such other condition as the Attorney General may prescribe* . . .

This provision obviously contemplates that judicial review may be had even though the alien is not in custody. Furthermore, the Court's present opinion states that the term "judicial review" in the Administrative Procedure Act does not include habeas corpus. It would not be reasonable, therefore, to construe "judicial review" in the 1952 Immigration and Nationality Act (reported by the same committees that reported the Administrative Procedure Act) as limited to habeas corpus.

Because Congress realized that the injunction remedy was available under the 1952 Act, notwithstanding the

finality provision, it felt it necessary to expressly limit th judicial remedy to habeas corpus in a particular exclusio situation in which it wished to oust injunctive review. Sec tion 360(c) of the Act (8 U.S.C. 1503(c)) provides wit respect to persons seeking to enter the country under disputed claim of American nationality:

> A final determination by the Attorney General that an such person is not entitled to admission to the Unite States shall be subject to review by any court of com petent jurisdiction in habeas corpus proceedings an not otherwise.

The legislative history fortifies our view of the 1952 Act The bills reported by the House and Senate Committee (S. 2550 and H.R. 5678, 82nd Cong., 2d Sess.) designedly omitted provisions in antecedent bills which would have limited judicial intervention to habeas corpus (S. Rep. 1137 82d Cong., 2d Sess., p. 28), probably as a result of opposition voiced by the American Bar Association and the Association of Immigration and Nationality Lawyers (*Joint Hearings before Subcommittees of Committees on the Judiciary on S. 716, H.R. 2379, H.R. 2816*, 82d Cong., 1st Sess., pp. 537, 673).

During the House debate, Representative Walter, in charge of the bill, stated (98 Cong. Rec. (daily ed.) 4483):

> Now we come to this question of the finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedures Act is applicable. From that decision an appeal lies in the courts. If there is not a final administrative decision, then these aliens will go from one administrative body to another, seeking relief, because they do not want a final adjudication.
>
> * * * In view of the fact that every person who is ordered deported has all of these administrative processes available, plus an appeal to the court, plus the

> right to a writ of habeas corpus, I cannot conceive of a case where any injustice would be done by some capricious or arbitrary administrator.

Mr. Walter's explanation is particularly authoritative because in addition to being in charge of the immigration bill, he is generally regarded as one of those most responsible for enactment of the Administrative Procedure Act.

The conferees also appear to have shared Mr. Walter's view. The Conference Report (No. 2096, 82d Cong., 2d Sess., to accompany H.R. 5678) states:

> Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and pattern of the Administrative Procedure Act.

Finally, the 1952 Act must be interpreted for constitutional reasons to permit injunctive review of deportation orders, including orders issued prior to the effective date of the Act. Otherwise, a deportee can be subjected to onerous and humiliating supervision requirements without having an opportunity to challenge before a judicial tribunal the validity of the deportation order on which the supervision requirements are based.

The Attorney General's authority to hold an alien in custody expires six months after the final deportation order has been outstanding (sec. 242(*c*)). Thereafter, however, the Attorney General may, under section 242(d), impose stringent supervision requirements, and this though the deportation order was issued "heretofore" (i.e., prior to the Act).

Under his supervision authority, the Attorney General may require the alien to appear from time to time before an immigration officer for identification, to submit to medical and psychiatric examination, to give such informa-

tion under oath "as the Attorney General may deem fit and proper," and "to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case." Violation of the supervision restrictions is a severely punishable felony. Sec. 242(d), 8 U.S.C. 1252(d).

If injunctive review of deportation orders is not available, an impossible situation is created for aliens who are not in custody, including those who, under the six-months rule, cannot be taken into custody.[1] The alien cannot test in court the validity of the deportation order, which causes him to be under a species of house arrest, short of subjecting himself to a felony prosecution by violating the supervision. Even then the alien has no assurance that the criminal court will permit a collateral attack on the validity of the deportation order. Such an alien, therefore, has no adequate judicial remedy against an invalid deportation order and its supervision consequences. Due process requires, however, that the alien be afforded judicial review of the constitutionality of the deportation order before he suffers its consequences. *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 51, 52; *Ng Fung Ho* v. *White*, 259 U.S. 276, 284-285. This review must be available by an adequate remedy, and a remedy which can be used only by risking criminal punishment is not adequate. *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331.

III.

The opinion of the Court states that "appellant relies primarily on § 10 of the Administrative Procedure Act." In fact, however, the Court does not even allude to the contention on which we primarily relied. This contention was that the finality provision of the Immigration Act has no bearing here because the suit attacks not the Attorney.

[1] This includes thousands of aliens whose deportation orders had been issued more than six months before the supervision restrictions became effective.

General's finding under the statute but the validity of the statute itself (Reply Brief for Appellant, pp. 1-3). Surely the point is not frivolous and merits consideration. During the oral argument, Mr. Justice Frankfurter clearly indicated his agreement with this contention, and we believe that its merit is shown in our Reply Brief.

The Court's opinion relies on habeas corpus decisions (most of them in exclusion cases) which held that the extent of judicial scrutiny of deportation orders was limited. The question here, however, is as to the appropriate remedy where the constitutionality of the statute is challenged. The *Elg* and *Kristensen* cases permitted injunctive and declaratory remedies where the issue was the authority of the Attorney General to act, as distinguished from a review of the "final" administrative order. This case also seeks to litigate the authority of the Attorney General to act. In *Elg* and *Kristensen*, the lack of authority arose from the litigant's citizenship or eligibility for naturalization, but lack of authority arising from the unconstitutionality of the underlying statutes surely places the administrative agency in no better position. The Court distinguishes *Elg* and *Kristensen* as having involved questions of status, but this distinction does not go to the principle involved. On principle, *Elg* and *Kristensen* are apposite.

As matters now stand, the Court has failed to consider the precise question posed by this case. That question is not whether deportation orders may, in general, be reviewed by injunction. It is whether injunctive relief is available from a deportation order entered under an unconstitutional statute.

IV.

Although the opinion disclaims, in a footnote, consideration of the 1952 Act, the text in its present form will, we believe, tend to be construed by bench and bar as an expression of a view by the Court that injunctive review of deportation orders is not available under the 1952 Act. The opinion states: